

Volume II
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 367

UNITED STATES, APPELLANT,

vs.

CONTINENTAL CAN COMPANY, ET AL.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

FILED AUGUST 13, 1963
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SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Transcript of Proceedings—October 3, 4, 5, 6, 10, 11, 13,
14, 17, 18, 19, 20, 24, 28, December 8, 1960

Before: Hon. Frederick P. Bryan, District Judge.

New York, October 3, 1960, 10:30 A.M.

APPEARANCES

Richard B. O'Donnell, Esq., Attorney, Department of Justice, For the Plaintiff; William H. McManus, Esq. and Samuel V. Greenberg, Esq., Attorneys, Department of Justice, of Counsel.

[fols. 2292a-2324] Willkie, Farr, Gallagher, Walton & Fitzgibbon, Esqs., Attorneys for Defendant Continental Can Company, Inc.; Mark F. Hughes, Esq., Helmer R. Johnson, Esq., and Bowie K. Kuhn, Esq., of Counsel.

Covington & Burling, Esqs., Attorneys for American Can Company; H. Thomas Austern, Esq., of Counsel.

[fol. 2325] RICHARD L. CHENEY resumed.

The Court: Mr. Cheney, you may recall that you were previously sworn here.

The Witness: Yes, sir.

The Court: And you will please remember that you are still under oath.

The Witness: Yes, sir.

The Court: Very good.

Mr. McManus: Your Honor, to avoid confusion and to be able to get the documents out that I intend to refer to, for the Court's information they are, with the exception of one document, all in the folder marked 1 to 39.

The Court: All right.

[fol. 2326] Mr. Hughes: Your Honor, we are getting our copies.

The Court: All right. Just hold it a minute, then.

Mr. Hughes: All right, sir.

Mr. McManus: The other additional document will be referred to as No. 419.

I am now referring to documents G-1, 2 and 3. I would like to show it to the witness and ask him if he recognizes those documents.

The Court: Let me ask you this before you go any further.

G-1 and G-2 are letters of transmittal. Are 3 and—what was the other one, 4?

Mr. McManus: Your Honor, 1, 2 and 3 we are going to offer. I will gladly indicate the ones we are going to offer through Mr. Cheney at this time if that will be helpful.

The Court: What is 3? Is 3 enclosed in 1 and 2? Or is that a separate document?

Mr. McManus: My understanding, your Honor, is 3 is Mr. Cheney's reply.

Is that correct?

The Witness: That's correct.

[fol. 2327] The Court: All right. Go ahead.

Direct examination continued.

By Mr. McManus:

Q. Mr. Cheney, directing your attention to Government's Exhibit G-1 from the Obear-Nester Glass Company—

Mr. Hughes: Which one was that, please?

Mr. McManus: Government's Exhibit 1.

Q. —and signed "Joe, President," do you know who "Joe, President" is?

The Court: Did you get this letter from the Obear-Nester Glass Company?

The Witness: I did.

The Court: What is the president's name—Joseph M. Nester?

The Witness: Yes. He has since passed on.

The Court: You got that letter. Did you get the next letter too?

The Witness: I did, sir.

Mr. Hughes: Your Honor, I don't want to confuse this, but in my records that is Exhibit G-2, not G-1.

The Court: They are both signed "Joe." G-1 is signed [fol. 2328] "Joe" and G-2 is signed "Joe," and they are both from the Obear-Nester Glass Company. 1 is March 4, 1954, and the other one is March 24, 1954.

Mr. McManus: These are my notes.

Q. Now, directing your attention to Government's Exhibit G-1, it indicates that there was an enclosure with that document.

A. That's correct.

Q. Are you familiar with the enclosure that came with that document?

A. I can't recall exactly what it was. I know the general nature of it.

Q. Would you look at Government's Exhibit G-419, the last page only. Just the last page here.

A. Yes.

The Court: Is that the letter entitled "Dear Mother"?

Mr. McManus: Yes, sir, dated February 23, 1954.

Q. Do you know if this is the letter, or a copy of this letter, that was attached to Government's Exhibit G-1, Mr. Cheney?

A. It was either that letter or one very similar to it. [fol. 2329] Q. Going now to Government's Exhibit G-2, which refers again to an enclosure, I refer you to Government's Exhibit 419, next to the last page, which is a letter from May Tarber addressed "Dear Mother," dated March 16, 1954. Is that the letter or a copy of the letter referred to, to your knowledge, in the March 24, 1954, communication of Mr. Nester?

A. It is either the letter or the subject matter is very similar to that.

Q. Going now to Government's Exhibit G-3, from R. L. Cheney to J. M. Nester, dated April 2, 1954, is that your reply to Government's Exhibit G-1 and G-2?

A. It is.

Mr. McManus: Your Honor, the government offers Government's Exhibits G-1, 2 and 3—

The Court: Is that 419?

Mr. Hughes: Yes.

The Court: All right.

Mr. Hughes: Yes.

Mr. McManus: —offers Exhibits G-1, 2 and 3, your Honor, in evidence for the purpose of showing the concern of the glass people with competition from metal cans in the baby food field.

[fol. 2330] Mr. Hughes: Your Honor, just so I can shorten this up, the same objection that I have been making to all these GCM documents.

The Court: The same ruling. These will not be admitted for the truth of any of the facts contained therein but simply for the purpose of showing what was going on in the exchange of correspondence at that time.

Wait a minute, gentlemen. The clerk calls my attention to the fact that according to his records 419 is not in evidence, but 419A, B and C are in evidence. If we are incorrect in that—

Mr. Hughes: That might be, sir. Can we have a minute?

The Court: Yes. I think, gentlemen, if we once start getting these exhibits confused on the record, we are in a very bad way, indeed.

Mr. Hughes: Yes, I believe so, your Honor. Our record indicates that the clerk is correct, your Honor.

The Court: So 419 is not presently in evidence.

The Clerk: That's right, your Honor.

The Court: We haven't gotten into motherhood yet, the [fol. 2331] motherhood phase of the case.

Mr. McManus: Your Honor, the government offers the letter dated March 16, 1954, from May Tarber to "Dear Mother," and the February 23, 1954, letter from May Tarber to "Dear Mother," which are the last two pages of Government's Exhibit G-19.

The Court: G-419.

Mr. McManus: Excuse me, G-419.

The Court: For identification. You are offering the last?

Mr. McManus: Two pages in evidence as the type of information that was enclosed with G-1 and 2 of the government's exhibit.

Mr. Hughes: The same objection as to relevance, your Honor.

The Court: Overruled. Same ruling.

Now we have got to assign these numbers. May I ask you this: Is it your intention—wait a minute. Are you sure that 419 is actually not in evidence, Mr. Clerk?

The Clerk: Yes, your Honor.

The Court: Then you better restore this identification mark.

The Clerk: I am.

[fol. 2332] The Court: Are you offering 419, apart from these exhibits?

Mr. McManus: No, your Honor, we are not.

The Court: Then let us use No. 419. They will both be considered as one exhibit, 419, the two letters.

Mr. McManus: Those letters are the letters dated March 16, 1954, with the heading of Continental Can Company, Inc., from May Tarber, Food Container Evaluator to Dear Mother, and the letter of February 23, 1954, with the heading Continental Can Company, Inc., from May Tarber, Food Container Evaluator to Dear Mother."

The Court: That will be Exhibit 419.

Mr. Hughes: The two of them together?

The Court: Yes, they will be Exhibit 419. The content is practically identical.

(Government's Exhibit 419 received in evidence.)

Mr. Hughes: Your Honor, I want to be clear again that there is the same limited nature in these rulings as there was in the previous rulings.

The Court: That is all, as I understand it, that the offer was, and the same limitations are placed on it. It is the [fol. 2333] same as my immediately previous ruling.

Mr. McManus: Your Honor, the next exhibit the government will offer is G-14.

The Court: All right. This is your letter, is it, Mr. Cheney, sent to Langselt of the Armstrong Cork?

The Witness: It is, sir.

The Court: Right. Do you want to offer it?

Mr. McManus: We offer it, your Honor, for the same purpose.

Mr. Hughes: Same objection.

The Court: Same ruling.

(Government's Exhibit G-14 for identification received in evidence.)

Mr. McManus: The next exhibit, your Honor, is Government's Exhibit G-16.

The Court: Has Mr. Cheney got this exhibit before him?

Mr. McManus: This is it.

The Court: You better stay up there so we don't have to walk back and forth each time.

Look at 16. Is that a letter from you to Pollock of [fol. 2334] Thatcher Glass?

The Witness: Yes, sir, it is.

The Court: You offer it for the same purpose, Mr. McManus?

Mr. McManus: Yes, we do, your Honor.

Mr. Hughes: Same objection.

The Court: Same ruling.

(Government's Exhibit G-16 for identification received in evidence.)

The Court: I know, Mr. Hughes, if there are any special considerations, you will point them out to me in connection with any of these matters.

Mr. McManus: The next exhibit, your Honor, is Government's Exhibit G-24.

The Court: Is this a letter from you to Heuisler of Maryland Glass?

The Witness: Yes, sir, it is.

The Court: You offer it, Mr. McManus?

Mr. McManus: Yes, your Honor, same purpose.

Mr. Hughes: Same objection.

The Court: Same ruling.

(Government's Exhibit G-24 for identification received in evidence.)

[fol. 2335] The Court: This has to do, I take it, largely with plastics; is that right?

Mr. McManus: Yes, your Honor.

The government now offers G-31 for the same purpose.

The Court: That is a letter from you to William J. Green of Thatcher Glass, Mr. Cheney?

The Witness: Yes, sir, it is.

The Court: Under the date specified, whatever it is?

The Witness: October 21, 1958, yes, sir.

The Court: Yes.

Mr. McManus: The government now offers it, your Honor, for the same purpose.

Mr. Hughes: Same objection.

The Court: Same ruling.

(Government's Exhibit G-31 for identification received in evidence.)

1 [fol. 2336] Mr. McManus: Your Honor, in so far as documents that we are going to put in through Mr. Cheney are concerned, we are completed with them. However, if you recall, you did allow me to reserve examination of Mr. Cheney about certain documents which were prepared by the defendant and which he identified. I understand that there was some error in the marking of those documents or in the transcript, and to clear the record, I think Mr. Hughes would like to make a statement.

Mr. Hughes: I will, your Honor, in just a moment.

The Court: In the meantime, Mr. Clerk, I will give you these documents back.

Mr. Hughes: Your Honor, at page 2100 of the transcript, there is an indication that a document was marked as Defendants' Exhibit M. That should have been Defendants' Exhibit N.

In addition to that, at page 2102, there is an answer by Mr. Cheney in which he is referring to Exhibit N, and the transcript of the answer reads as follows:

"A. Yes. The ones that are listed on Exhibit N would be the ones that I could not give you an opinion on."

[fol. 2337] It is my understanding that that is incorrect, and that the answer should read:

"A. Yes. The ones that are listed on Exhibit N would be the ones that I could give you an opinion on."

In other words, the negative should not have appeared, because Exhibit N was the list which Mr. Cheney prepared and identified.

Is that not correct, Mr. Cheney?

Mr. McManus: Show them to Mr. Cheney.

Mr. Hughes: I will show Exhibit N to you, and I will show Exhibit O to you, and will you tell me which of these was the list which you prepared?

The Witness: Well, I didn't prepare the list. I gave the answers here.

Mr. Hughes: Well——

The Witness: And N is the one on which I was able to give the answers.

Mr. Hughes: Yes. On which you were able to give estimates with reasonable certainty.

The Witness: That's right.

The Court: Let me have Exhibit N, will you please, Mr. Clerk?

Mr. McManus: The defendant has it, I believe, your Honor.

[fol. 2338] The Clerk: I don't have the original, your Honor.

Mr. McManus: They took the originals back.

The Court: Oh, let me see it.

All right.

Mr. McManus: Your Honor, before I examine Mr. Cheney, I am going to object to this document on the basis that there has been no foundation laid that Mr. Cheney is qualified to give any estimate on the proportion, as he said, proportion of these that go in either type of container.

Mr. Hughes: Your Honor, they are already in evidence. They were admitted.

The Court: I admitted them.

Mr. McManus: I move to strike them.

The Court: Denied. You brought Mr. Cheney here as a fairly competent fellow in this business, and I am going to take it.

Mr. McManus: Your Honor, we don't qualify Mr. Cheney as an expert on how many glass jars pack peanuts and how many don't.

The Court: This all goes to the weight.

Q. Mr. Cheney, directing your attention to Defendants' Exhibit N——

[fol. 2339] The Court: Here is the original. Has somebody got a copy of that report so I can follow what is going on?

Mr. McManus: Would you give Mr. Cheney Exhibit O?

Mr. Hughes: Do we have the original of Exhibit O?

The Court: Just so I am entirely clear in following this,

as I recall, Mr. Cheney was asked if he could express or make certain estimates as to the percentage that was packed in glass and in cans, and it was this long list of various substances that he checked over, the substances or products on which he thought he could make a reasonable estimate and said he could not as to the others; is that correct?

Mr. Hughes: He said that he could make an estimate with reasonable certainty.

The Court: Yes.

Mr. Hughes: As to those that appear on N, N being a selection of a larger group that appeared on O.

The Court: All right.

Q. If you would, Mr. Cheney, to make it clear, as I understand it, Defendants' Exhibit O was prepared by the defendant; is that correct?

[fol. 2340] A. Or at least it was shown to me by the defendants.

Q. And by the defendants, who showed it to you?

A. Mr. Hughes.

Q. Was anyone else present?

A. Yes. I think Mr. Kuhn and Professor Handler.

Q. And about when was this?

A. This was a few days before my last appearance here.

Q. And you had had prior conferences with the defendants on this matter?

A. Not on this matter; no, sir.

Q. Oh, on other matters?

A. On other matters; yes, sir.

Q. And so you were shown Government's Exhibit O just a few days before you intended to testify here?

A. That's correct; yes, sir.

The Court: I think this is Defendants' Exhibit O.

Mr. McManus: Excuse me. Defendants' Exhibit O.

Q. And you took that list, and you selected from that list, while you were seated, talking to them, the ones that you thought you could make an estimate on?

A. Yes.

Q. I mean, you didn't take this back to your office and [fol. 2341] consult any notes or any past recollection? They just asked you, could you make an estimate on ammonia, and you said, "Yes, I could make an estimate on ammonia"?

A. That's correct.

Q. And this language, directing your attention now to Government's Exhibit N—

Mr. McManus: Excuse me. I will correct that.

Q. And this language, directing your attention now to Defendants' Exhibit N, where it says "All or substantially all ammonia is packed in glass", is that your language or is that the defendants' language?

A. That's my language.

Q. That is your language. Now, could you tell me this: when you say "all", you mean that no ammonia is packed in metal cans?

A. Well, when I say "all" or "substantially all", I mean either none or a small quantity relative to in glass.

Q. When it says "all", it means all ammonia is packed in glass?

A. If I had said all, that would have been what I meant. [fol. 2342] Q. Didn't you say all, Mr. Cheney?

A. No. I said "all" or "substantially all".

Q. Well, it is either one or the other, Mr. Cheney? It is either all or substantially all?

A. That's correct.

Q. So if there is one can of ammonia packed in cans, that would not be correct, would it?

A. No. It would be substantially all.

Q. And if I asked you that question about any of these others which say "all" or "substantially all", your answer would be the same?

A. Yes, sir.

Q. As I understand it—

The Court: Let me ask you this, Mr. Cheney: When you say "substantially all", what proportion would you say would be excluded from the word "substantially" or "substantially all"?

The Witness: I don't understand your question, sir.

The Court: Well, you say substantially all of something—let us take this record. Let us say that substantially all of this record was transcribed by one court reporter. What proportion of the record would you say was so transcribed?

[fol. 2343] The Witness: 95 per cent or more.

The Court: 95 per cent or more?

The Witness: Yes, sir.

The Court: All right.

Q. All right. Now, going back to ammonia, Mr. Cheney, could you tell me, in 1959 or 1956 or for any year since 1955 the amount of ammonia that was packed in glass containers?

A. No, sir; I could not.

Q. Could you tell me the amount, if any, that was packed in metal containers?

A. No, sir; I could not.

Q. Could you tell me how much ammonia was packed for household use?

A. No, sir.

Q. Suppose I went to any of these other items on page 1 of Exhibit N. Would you look at it, and would you tell me the quantity that was packed in metal containers in units or in dollars or any significant figure.

A. Not without referring to records in my office.

Q. And you did not do that when you made up this list; is that correct?

A. That's correct.

[fol. 2344] Q. Now, going now to Exhibit O, on Defendants' Exhibit O there happens to be a product list as beets, which to my knowledge does not appear on Defendants' Exhibit N; is that correct?

A. That's correct. I don't have a copy of O here, but I recall it was on Exhibit O.

Q. This is a copy of Exhibit O. You might take a look at it.

A. Yes. It appears on Exhibit O.

Q. Are beets packed in metal containers?

A. Yes, sir; they are.

Q. Are they packed in glass containers?

A. Yes, sir; they are.

Q. How many beets, to your knowledge—how many beets were packed in metal containers last year?

A. I don't—

The Court: How many beets?

Mr. McManus: Yes, sir. In—

The Court: You don't mean, how many beets?

Mr. McManus: Excuse me. I withdraw that.

Q. How many metal containers were used for the packaging of beets?

A. I don't know that.

Q. And how many glass containers were used for the [fol. 2345] packaging of beets?

A. I don't know that.

Q. Do you know how many beets were packaged last year in either metal containers or glass containers?

A. I don't know that.

Q. In other words, you know no more about how many beets were packaged than you know about how many glass containers were used for ammonia; is that correct?

A. That's correct.

Q. And if you would examine Defendants' Exhibit N, which I understand you had—I don't like to be repetitious. Could you look at that and tell me if you know how many metal containers were used to package any of those products?

A. In what year?

Q. Well, in the year that you refer to in this exhibit, whichever year that is. I understand that is current.

A. That was current. I have in mind an estimate of about 450 million cans used for soft drinks in 1959, and an estimate that this total may reach 800 million—700 million—excuse me—in 1960. In none of the other cases do I carry in mind the volume.

[fol. 2346] Q. Could you tell me, referring again to Defendants' Exhibit N, the number of glass containers that were used to package any of these products?

A. In the case of the soft drinks, the estimates of American bottlers of carbonated beverages were 35 billion bottles of soft drinks in 1959, and again, that is the only item in which I would carry in mind an estimate of the volume.

Q. And this is based on the American bottlers. This is not of your own knowledge. This is from the American Bottlers Association; is that correct?

A. That's correct.

The Court: Are those public figures?

The Witness: They are, sir?

Q. Is that true of American Can? Did American Bottlers give you those?

A. No. That came from the American Commerce report of tonnages of steel used for various types of cans, including soft drink cans.

Q. So that of all the products listed on Defendant's Exhibit N, the only one that you can recall in which you know the quantity of metal cans or glass containers, is in regard to soft drinks; is that correct?

A. That's correct; yes, sir.

[fol. 2347] Q. If I asked you the number of plastic containers that were used for any of these products, what would your answer be there?

A. I would not have such a figure in mind.

Q. Going over to Defendants' Exhibit O, a copy of which I hand you, could you tell me if there are any products on that list in which you know how many glass containers were used to package any of those products?

A. Other than soft drinks, no.

Q. Would you know how many metal containers were used to package any of those products?

A. No, sir; I would not.

Q. And would you know how many plastic containers were used to package any of those products?

A. No, sir; I would not.

Q. Directing your attention now, again, to Defendants' Exhibit N, the heading is "Ammonia." What are the principal companies packaging ammonia in metal cans or glass containers today?

A. I do not know that.

Q. You don't know the names of any of the companies?

A. I know one: Parsons.

[fol. 2348] Q. And does Parsons package product in metal cans?

A. In glass.

Q. In glass only?

A. To my—

Q. Are you sure of that?

A. No. I'm not sure of that. I know they package in glass. That's what I—

Q. You don't know whether they package in cans or not, do you?

A. No; I don't.

Q. And they are one of the principal companies; is that correct?

A. That's correct.

Q. Are there any other companies that package ammonia in metal cans, to your knowledge?

A. I don't know, sir.

The Court: He didn't say Parsons packaged in metal cans.

Mr. McManus: He said they package it in glass.

The Court: He doesn't know whether Parsons packages it in metal cans.

Q. So if Parsons packages it in metal cans, the classification of "all" would not be correct, would it?

Mr. Hughes: I object to that, your Honor.

[fol. 2349] The Court: All right. Objection sustained.

Q. If you do not know the quantity of ammonia that was packaged in glass containers or metal cans or plastic containers, and you don't know any of the companies with the exception of Parsons that packages this product, what do you base your estimate on that all or substantially all is packaged in glass containers?

A. In our continuing review of trade papers in these fields, and any knowledge about new packages or changes in packaging that go through my department and over my desk, I have—if there had been any substantial amount of packaging of ammonia in metal cans, it would surely—in my opinion it would surely have come to my attention.

Q. But of course it may or may not have come across your desk; is that correct?

A. That's correct.

Q. I take it in compiling this list, being as you did it right in the lawyer's office, you made no attempt to contact your office to verify this list, N, Defendants' Exhibit N?

A. I made no such effort.

Q. You made no effort to contact any packers?

A. That's correct.

[fol. 2350] Q. You made no efforts to examine any stores that might sell any of the products?

A. That's correct.

The Court: What were you doing? You were drawing on your best recollection?

The Witness: That's correct. Yes, sir.

Mr. McManus: Your Honor, the Government moves to strike Defendants' Exhibit N. I mean, I think it is entirely clear that Mr. Cheney is not qualified to make these estimates except as an ordinary person who might walk around the street and read the papers and walk in or out of the stores, and if you accept it, it would only be entitled to the same weight as any normal individual might make from just his normal purchases in or out of a store.

The Court: No. Your motion is denied.

Mr. McManus: That is all we have of Mr. Cheney.

Cross-examination.

By Mr. Hughes:

Q. Mr. Cheney, it is part of your job with GCMI, is it not, to try to keep yourself as well informed as you can on the kinds of products that move in particular types of containers; isn't that right?

A. That's correct.

[fol. 2351] Q. And when you prepared Exhibit N in evidence, were you drawing on the sum total of your knowledge and experience in bringing that to bear in estimating the items that are on that list?

A. I was; yes, sir.

Q. And do you say that those estimates, that you can make those estimates based upon your knowledge and experience with reasonable certainty?

A. I believe so; yes, sir.

The Court: Yes.

Mr. Hughes: I have some—

The Court: I thought you had finished your examination.

Mr. Hughes: No, sir.

The Court: Go right ahead.

Mr. Hughes: I have a considerable number of other things to clarify.

The Court: You go right ahead. I was just pleasantly surprised at the brevity. That is all.

Q. Mr. Cheney, would you say that there was anybody in the world who could tell his Honor the specific amount of beets that were packed in glass in the year 1959?

A. I doubt if anybody carries those figures in mind.

[fol. 2352] Q. Referring to Exhibit N—and Exhibit N is the list where you gave the estimates with reasonable certainty; you recall that—you have that in front of you.

A. I have that in front of me.

Q. Would you say, Mr. Cheney, that in the food items you were not considering frozen foods, fresh foods or dehydrated foods except where the list indicates that?

A. That's correct; yes.

Q. Mr. Cheney, on your direct examination, you referred to a Committee on Standards and Finishes; do you remember that?

A. Standards for Finishes.

Q. Standards for Finishes. Will you tell his Honor what the purpose and function of that committee is?

A. The—

The Court: That was a committee of the glass container manufacturers.

The Witness: The Glass Container Manufacturers Institute.

Mr. Hughes: The Institute, yes.

A. First, the finish of a container is that portion of the container which the closure attaches or fits. The purpose of the Committee on Standards for Finishes is to develop [fol. 2353] recommended standards for finishes to accommodate the various types of closures in order to give the closure manufacturer and the glass container manufacturer a standard to work to.

The glass container manufacturer, when specified to do so by his customer, would furnish a container with a certain GCMI numbered finish. Then, if the customer orders caps to fit that container, the closure manufacturer would have this standard on the blueprint and could manufacture his caps so as to give a satisfactory closure with that finish, knowing that that would be found on the containers.

Q. So in those instances where the closure manufacturers choose to make it available to themselves, they use

the specifications which this committee has developed for these finishes; is that correct?

A. That's correct.

Q. Does this Committee on Standards for Finishes have among its membership representatives of both the glass companies and the companies who manufacture closures?

A. Yes, sir; it does.

Q. And has that been true through the years?

A. Yes, to the best of my knowledge, since the committee started.

[fol. 2354] Q. And are these specifications for standard finishes available to non-members of the GCMI?

A. Yes; they are.

Q. So that glass container manufacturers who are not members can obtain these standard specifications; is that correct?

A. That's correct.

Q. And is that also true of closure manufacturers who are not members of the GCMI?

A. Yes, sir; it is.

Q. And do I understand that the purpose of this work, the ultimate purpose is to have standard specifications so that you get a good and effective seal between the container and the closure?

A. Yes. Recommended standards for that purpose.

Q. Would you say that if your specifications are followed both by the glass container manufacturer and the closure manufacturer, you do get an effective and a good seal?

A. Yes. Our specifications do not go to the caps. They go only to the glass.

Q. My question was, if the glass container manufacturer follows them and the closure manufacturer follows them, you will get an effective and a good seal; is that right?

[fol. 2355] A. Yes, sir.

Q. Would you say that standard specifications for finishes have been developed for substantially all glass containers except in the cases where there might be a new style or an experimental style of glass containers?

A. Yes. That's correct.

Q. And is this arrangement within GCMI a purely voluntary one as to developing these specifications and making use of them?

A. That—it is; yes, sir.

Q. And in practice, would you say that everyone does make use of these specifications, as far as you know?

A. As far as I know, they do; yes, sir.

Q. And would you say that the work of this committee has been effective in the purpose of developing specifications that make for a good seal between the glass container and the closure?

A. Yes, sir. We think it has been very effective.

Q. Does Glass Container Manufacturers Institute make estimates of the total glass container packages going to market each year?

A. Yes; we do.

[fol. 2356] Q. And I am talking about filled glass containers that find their way into the market place.

A. Yes.

Q. You make estimates of what that total is; is that correct?

A. That's correct.

Q. And in making that estimate, you have to take into account both the returnable bottle and the non-returnable bottle; is that correct?

A. That's correct.

Q. That being so, will you tell his Honor how you go about making these annual estimates of the number of bottles that actually go to market in a given year?

A. We take—

Q. Glass containers.

A. Glass containers. Yes. We take totals from the Department of Commerce statistics for all glass containers except those for soft drinks, beer and milk, because part of each of those three categories is returnable. Then, to that we add all other glass containers—

The Court: Are those figures glass containers manufactured or glass containers sold?

[fol. 2357] The Witness: Shipped.

The Court: Shipped?

The Witness: Yes, sir; and we have to assume that they are used in the year shipped.

The Court: Yes.

The Witness: Which isn't precisely true, of course.

The Court: All right.

A. (Continuing) Then to that we add the number of crowns from Department of Commerce figures used to seal soft drink bottles, the number of crowns according to the Department of Commerce figures used to seal beer bottles, and the number of closures according to Department of Commerce figures used to seal milk bottles, and adding those to the total number of the other glass containers we get the number of glass packages that went to market in that year, assuming that those—

The Court: In other words, dealing in all of the areas where you've got returnable bottles, you go on the closure count rather than the bottle count?

The Witness: That's right; yes, sir.

Q. And pursuing that method, you arrive at an estimate of the total glass packaging going to market in any one year; is that right?

[fol. 2358] A. That's correct; yes, sir.

Q. And do you in your work consider that this is the meaningful way of determining the size of the annual glass container usage?

A. Yes. That's the most accurate way I know of.

Q. And did you at my request prepare from your records an estimate of the total glass packages going to market in the years 1954 to 1959?

Mr. McManus: Your Honor, I am going to object to this. To my knowledge, this has never been shown to the Government. I thought there was a fair exchange of documents here, and we have had no chance to look at any of this. We don't even have a copy now.

The Court: You will have a chance right now, because we are going to lunch, and a copy of the documents will be given to the Government over the lunch hour to look at it. We will return here at ten minutes after 2.

Mr. McManus: May these be marked?

The Court: Yes.

(Marked Defendants' Exhibit D-356 for identification.)

(A luncheon recess was taken to 2:10 P.M.)

[fol. 2359]

AFTERNOON SESSION

2:10 P.M.

The Court: Mr. Cheney, would you resume the stand, please.

RICHARD L. CHENEY resumed.

Cross-examination continued.

By Mr. Hughes:

Q. Mr. Cheney, as we recessed for lunch, I was asking you whether Defendants' Exhibit Q for identification was a compilation which you made at my request of your estimates—when I say “you”; I mean the GCMI estimates of total glass packages going to market in the years 1954 through 1959. Did you make that list at my request?

A. Yes, sir; it is.

Q. And when did you make it for me?

A. On Friday.

Q. And is the material indicated in this list taken from your records?

A. It is.

Q. And these are the figures which the GCMI estimates of total glass packages going to market in the years 1954 through 1959; is that correct?

A. That is correct.

[fol. 2360] Mr. Hughes: I offer it in evidence.

Mr. McManus: I have a few questions I would like to ask about it, but if Mr. Hughes would like to continue his examination, I will ask them at the end of it.

The Court: You might just as well ask about it now, unless it unduly interrupts Mr. Hughes.

Mr. Hughes: No, sir. That is perfectly all right.

The Court: All right.

By Mr. McManus:

Q. Is this figure, 73.1 billion based in part at least on your GCMI statistical data?

A. It is based on Department of Commerce statistical data.

Q. Is any of it based on your GCMI data?

A. No, sir.

Q. None of this is based on the data you collected from your members?

A. No, sir.

Q. And, as I understand it, what you have done here is that in the line of beer you have estimated the number of trips a beer bottle will take; is that correct?

[fol. 2361] A. No, sir. We, in the case of beer, soft drinks and milk, we rely on the Department of Commerce figures as to closures shipped in that year.

Q. Or crowns?

A. Crowns, yes.

Q. So that would take into account the re-use feature of the returnable bottles; is that correct?

A. That's correct; yes, sir.

Q. And this would be concerned with the brewer, for example, re-using his bottle; is that correct?

A. Yes, sir.

Q. This would not be a new sale by a glass container manufacturer to a brewer, it would not reflect that?

A. Not as it applies to the returnable bottles; no, sir.

Q. How about in regard to the non-returnable bottles? How do you take care of that factor in this chart?

A. Well, in products other than those where a returnable container is used, we use the Department of Commerce statistics as to the shipments of those containers. This would be food containers and wine, liquor and so forth. Then, when we come to the three categories, we set aside [fol. 2362] any information as to glass container shipments and count the closures, crowns in the case of beer and soft drinks, and milk bottle closures in the case of milk bottles, as representing the number of packages that went to market.

Q. I see.

A. So that that automatically includes both no-deposit and deposit beer bottles and soft drink bottles.

Q. So that there was a number of these 74.5 billion in 1959 which were not shipped by the glass container manufacturer?

A. That's correct.

Q. Do you know what proportion of this group was shipped by the glass container manufacturer?

A. Yes. Our shipments in 1959 were 21 billion units.

Q. And the rest of this would be represented by re-use; it would be represented by re-use, I take it?

A. That's correct.

The Court: Just let me inquire here. Was the total 79 billion? Is that right?

The Witness: 75.9 billion.

The Court: 75.9 billion?

[fol. 2363] The Witness: Yes, sir.

The Court: And of that 75.9 billion, only 25 billion represent shipments by glass manufacturers, and the others are refillables?

The Witness: Only 21 billion represent shipments of new glass containers. Now, out of that 21 billion, some are returnable, being used for the first time, and some of which will be used many times.

Q. But if I take the 21 billion from the 75 billion, I actually get 54 billion?

A. Yes.

Q. The great proportion of that group the glass container manufacturer has no control over, is not selling and has really no concern with it other than to replace them when they wear out; is that correct?

A. The latter part of your statement is correct.

Q. He is not selling the great majority of that 54 billion; is that correct?

A. Not in that particular year, no. At one time or another he sold them.

Q. These are just continually being re-used and not in the market?

A. That's correct.

Mr. McManus: That is all I have on the chart.

[fol. 2364] The Court: All right. You just offered this?

Mr. Hughes: Yes; I did.

The Court: Any objection to that?

Mr. McManus: No, your Honor.

The Court: It may be received.

Mr. Clerk, we will continue at this point in using the letter system of marking defendants' exhibits until we come to the exhibits in the defendants' case in chief.

Mr. Hughes: Very well, your Honor.

The Court: I think that would be better, and then we get a clear line of demarcation between your exhibits introduced during the course of the Government's case and your so-called exhibits in chief.

Mr. Hughes: All right. Then that—

The Court: If that has been marked—

The Clerk: It has, your Honor. It was marked before we recessed for lunch.

Mr. Hughes: It is the only one, your Honor.

The Court: It is the only one.

Mr. Hughes: It is the only one since we had this understanding in chambers the other day, so it is quite easy for—

[fol. 2364a] The Court: Is that going to throw anybody's schedule off? It seems to me a fairly sensible way of doing it.

Mr. Hughes: No. It will not disturb any schedule at all.

The Court: Very good. Then this will take the next letter in the line of defendants' exhibits.

(Defendants' Exhibit Q received in evidence.)

[fol. 2365] RICHARD L. CHENEY resumed.

Cross-examination continued.

By Mr. Hughes:

Q. Mr. Cheney, can you or your organization estimate the number of trips that a returnable beer bottle makes?

A. Yes. We do that each year.

Q: What is your current estimate of the number of trips that a returnable beer bottle makes?

A. A beer bottle makes 22 trips, is our current figure as I recollect it.

The Court: Is that 22 trips during the course of a year?

The Witness: No, sir, in the course of the life of the bottle.

The Court: In the course of the life of the bottle.

The Witness: Yes, sir.

Q. Can you estimate the number of trips of a returnable soft drink bottle?

A. About 25 trips.

Q. During the life of the bottle?

A. During the life of the bottle.

Q. Can you tell us how you make those estimates?

[fol. 2366] A. Yes. These are estimates based on a seven or eight-year period, and we do that because we have no way of knowing the inventory of empty bottles on hand at the beginning of any year, or in the float, as they call them. We take over the period of seven or eight years the figures, in the case of beer, the gallonage figures, from the alcoholic tax published figures, and we convert that into numbers of 12-ounce-size containers. That is, you divide the gallonage in ounces by 12 ounces and get the number of 12-ounce containers it would take to hold that gallonage.

We take the short tons of steel given in the Department of Commerce statistics on canned production for beer cans, and through conversion factors convert that into a figure representing the number of 12-ounce cans that would be made from such tonnage.

We then take the number of no-deposit beer bottles, as reported by the Department of Commerce figures and assume that they are all 12-ounce capacity. Then with the canned figure and the one-way bottle figure deducted from the total gallonage, we assume the rest of the beer went into returnable bottles, and we get from that an estimate of the number of bottles of beer that went to market in returnable [fol. 2367] bottles during that period of years. Then, dividing that figure by the number of returnable bottles which we shipped to the brewers over that period of years, we find the average number that is a fair estimate of an average number of trips each bottle made.

Q. Mr. Cheney, in your opinion, are there adequate sup-

plies of sand, soda ash and lime available in the United States as a whole which are suitable for the manufacture of glass containers?

A. Yes, sir.

Q. That would be true east of the Rockies?

A. Yes, sir.

Q. Would that be true west of the Rockies?

A. Yes, sir, it would.

Q. Would that be true in the State of California?

A. Yes, sir, it would.

Q. In your opinion, is there an adequate supply of labor in the United States as a whole for the manufacture of glass containers?

A. Yes, in my opinion there is.

Q. And would that be true east of the Rockies?

A. Yes, sir.

[fol. 2368] Q. West of the Rockies?

A. Yes, sir.

Q. And in the State of California?

A. Yes, sir.

Q. Mr. Cheney, since World War II, has Oil City Glass Company entered the business of manufacturing and marketing glass containers?

A. Yes, sir, it has.

Q. Would that have been around 1952?

A. I believe so.

Q. Since World War II, has Castle-Hansen Glass Company entered the business of manufacturing and marketing glass containers?

A. Yes, sir.

Q. When or about when would you say they entered the field?

A. I would say probably 1958.

Q. Did they take certain inactive facilities over, renovate them and put them into operation?

A. Yes, sir, they did.

Q. Since World War II, did the Metro Glass Company enter the business of manufacturing and marketing glass containers?

A. Yes, sir, they did.

[fol. 2369] Q. When or approximately when did they enter this business?

A. I would—to the best of my recollection, I would say about 1952.

Q. Would you want to correct that to 1947?

A. That could be.

Q. In any case, did Metro Glass become part of National Dairy Products Corporation?

A. Yes, it did.

Q. And about when was that?

A. I would say about 1957.

Q. And was that the first time that National Dairy Products Company entered the business of manufacturing glass containers?

A. Yes, sir, it was.

Q. Since World War II, did Warner-Lambert Pharmaceutical Company enter this business?

A. Yes, sir.

Q. And by "this business," I mean manufacturing and marketing glass containers.

A. I understand that.

Q. About when did they enter this business?

A. I would say 1956.

Q. Since World War II, did Arrowhead & Puritas [fol. 2370] Waters, Inc. enter this business?

A. Yes, they did.

Q. Would that have been around 1956?

A. I think so, yes.

Q. Did they take over inactive facilities, renovate them, and go into operation?

A. They did.

Q. And did Arkansas Glass Container Corporation enter this business since World War II?

A. Yes, sir.

Q. Would that have been around 1957?

A. Yes, sir.

Q. Did Underwood Glass Company enter this business since World War II?

A. Yes, it did.

Q. Would that have been around 1956?

A. Yes, sir.

Q. Did Star City Glass Company enter this business since World War II?

A. Yes, sir.

Q. Would that have been around 1957?

A. I should think so, yes, sir.

Q. Is Star City Glass Company presently a subsidiary of National Bottle Company, do you know?

[fol. 2371] A. Yes, it is.

Q. Did United Can & Glass Company enter this business since World War II?

A. Yes, it did.

Q. Was that approximately 1949?

A. Yes, sir.

Q. Did the Gallo Wine Company, through the E. J. Gallo Winery, Inc., enter this business of manufacturing glass containers in or about 1958?

A. Yes. I believe the name of the company is the E & J Gallo Wine Company.

Q. Did a company by the name of Glass Products, Inc. of Minneapolis, Minnesota enter this business about 1958?

A. Yes, sir.

Mr. Hughes: That is all I have, your Honor.

Redirect examination.

By Mr. McManus:

Q. Mr. Cheney, you indicated that you have a committee that attempts to set a standard finish on a glass so that it will properly fit a closure; is that correct?

A. Not exactly. We—

Q. Would you word it then?

[fol. 2372] A. Yes: This committee develops recommended standards for finishes so that—and it is to those standards that the closure manufacturers work.

Q. You don't have standards for all closures; is that correct?

A. We don't have standards for any closures. We have standards for practically all finishes, that is glass finishes.

Q. Are there a number that are not standard finishes that are used in glass containers?

A. A small number, yes.

Q. The finishes have tolerances; that is, you can't get a finish right on the head; is that correct?

A. That's right.

Q. So you have a tolerance from the minimum finish to the maximum that a cap manufacturer is supposed to meet; is that correct?

A. Of certain dimensions, yes.

Q. Aren't there instances, if a cap is made at the maximum tolerance and the glass finish is at a minimum, that in many instances these will not perfectly mate?

A. I don't know that I can say that.

Q. You just don't know?

[fol. 2373] A. No.

Q. You have gone over certain companies that have gone into business since 19—well, since World War II, I believe.

A. Yes.

Q. How did Warner-Lambert enter into the manufacture of glass containers?

A. Warner-Lambert purchased Emerson Drug, which owned Maryland Glass and Gulfport Glass Companies.

Q. So they entered through a merger?

A. Yes, sir.

Q. How did Oil City enter into the manufacture of glass containers. The Oil City Glass Corporation was a new organization which purchased a plant from the Knox Glass Company.

Q. They got one of Knox's plants?

A. That is correct.

Q. They did not build their own new plant?

A. No.

Q. And Castle-Hansen, how did it enter the manufacture of glass containers?

A. That was a new company which purchased and/or leased—that is, partly purchased, partly leased—a property which had been part of the Reid Glass Company, which [fol. 2374] had gone into bankruptcy.

Q. And Reid Glass Company went into bankruptcy since World War II?

A. Yes, and were closed down when Castle-Hansen entered.

Q. Arkansas Glass Company, how did that come into existence?

A. That came into existence as a new corporation. I think they virtually built a new glass-container plant, although over the years I recollect there had been some

facilities in Arkansas. I don't know whether they took over any existing—they did not take over an existing glass-container-manufacturing plant, to the best of my knowledge.

Q. But there was a plant already there, even though it wasn't in operation; is that correct?

A. I think that is possible.

Q. How did Underwood Glass Company get into business?

A. That is a new company and they built their facilities from the ground up.

Q. Where did they build those?

A. In New Orleans.

Q. Star City Glass Company, how did they get into the [fol. 2375] business?

A. They built their own manufacturing facilities new, and then they acquired—in the course of bankruptcy proceedings of Gaynor Glass Works, they acquired the Gaynor Glass Works which I think never closed down; I think they continued.

Q. Star City acquired Gaynor Glass Works?

A. Yes.

Q. United Can & Glass, when did they come into business?

A. The predecessor company was known as Atlas Diesel Engine Company, which was purchased by Hunt Foods. They sold the diesel engine business, took the plant facilities and built a can-manufacturing plant and a new glass-container-manufacturing plant.

Q. Have they acquired any other glass container manufacturer?

A. Hunt Foods have. They acquired the assets of Glass Containers, Inc., and set up a subsidiary known as Glass Containers Corporation, and now the glass facilities that were part of United Can & Glass are part of Glass Containers Corporation.

Q. Within the last year or two, have there been any new entries into the glass container business?

[fol. 2376] A. Well, if you would include 1958, there would be the Minneapolis.

Q. Since 1958?

A. Since 1958—let's see, there is one that may—I don't

believe it is in operation as yet, the American Wheaton in Terre Haute, Indiana.

Q. American what?

A. American Can Company is where the word "American" comes from. The name of the company is American Wheaton Company.

Q. What are the companies involved in the setup of that company?

A. American Can Company and Wheaton—it is either Wheaton Glass—yes, it is Wheaton Glass Company.

Mr. McManus: That is all I have of Mr. Cheney.

Recross-examination.

By Mr. Hughes:

Q. Mr. Cheney, did you want to make a correction in Exhibit N with reference to the item chili sauce?

A. Yes.

Q. Would you tell his Honor what correction you wish to make?

[fols. 2377-2388] A. On chili sauce, my answer would be correct if, after chili sauce, it would say "(consumer sizes)." My answer had to do with the retailer consumer sizes only.

Q. And it was only in those sizes that you were making your estimate?

A. Yes.

Mr. Hughes: That is all.

Mr. McManus: That is all, your Honor.

The Court: All right. You may step down, Mr. Cheney.

Before Mr. Cheney goes, I take it that the exhibits you referred to this morning, that these are all the exhibits you want to put in through Mr. Cheney?

Mr. McManus: That is correct, your Honor.

(Witness excused.)

[fol. 2389] LAURENCE E. DANBOM, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Where do you reside, Mr. Danbom?

A. Washington, D.C.

Q. And you are employed by the Federal Bureau of Investigation?

A. Yes, sir.

Q. In what field office?

A. Washington field office.

[fol. 2390] Q. How long have you been with the FBI, sir?

A. Nine years and ten months.

Q. Were you instructed by the Bureau to conduct an investigation for the Antitrust Division?

A. Yes, sir.

Q. When were you so instructed?

A. Approximately August 23rd.

Q. And what, in substance, were your instructions, sir?

A. I was instructed to—

Mr. Hughes: May we have it clear whether these instructions were oral or in writing, or both?

The Court: I think that is sound.

Q. What, in substance, were your written instructions, sir?

A. To report to the Department of Justice for an assignment.

Q. Did you so report?

A. Yes, sir.

Q. Would you describe what type investigation you conducted?

A. I was instructed to visit a number of grocery stores in the Washington, D.C., area, and to purchase food items from markets, food markets, that were used—packaged in [fol. 2391] the same—not in the same container, but the same product packaged in either glass or cans. Then, also, to visit drug stores and purchase products that were packaged in liquid—in plastic, glass and cans, and to purchase

products at a department store, household items, that were packaged in plastic and cans and glass.

Q. Did you purchase such products, sir?

A. Yes, sir.

Q. And are these products that you referred to in the courtroom here today?

A. Yes, sir.

Q. Where are they located?

A. On the table (indicating).

Mr. Greenberg: Will the record show that the witness has pointed to Government's counsel table.

The Court: Yes.

Q. Do they each have an identifying label on them?

A. Yes, sir.

Q. For what purpose?

A. So that I could identify them, and identify the place I purchased them, and the date, and my initials on each item.

Mr. Greenberg: Would you please mark this Govern- [fol. 2392] ment's Exhibit 949 for identification.

(Document referred to was marked Government Exhibit 949 for identification.)

The Court: Is that the same as —

Mr. Greenberg: That is the same as the Court's exhibit, your Honor.

The Court: The same as Court's Exhibit 2?

Mr. Greenberg: Yes, except that we have indicated for your Honor's benefit the G numbers which relate to each of the physical exhibits which we are introducing.

Mr. Hughes: That doesn't embrace the facing sheet, does it, of Court's Exhibit 2?

Mr. Greenberg: No, it does not.

Q. Now, Mr. Danbom, I show you Government's Exhibit 949 for identification, and ask you to tell us what it is.

A. This is the list of items that I purchased from the various stores in Washington, D.C., and the suburbs.

Mr. Greenberg: I offer G-949 into evidence, your Honor.

Mr. Hughes: I object to it as incompetent and irrelevant and immaterial. There has been no proper foundation laid

[fol. 2393] for its acceptance, and certainly has no probative value.

The Court: I will let you examine on it, Mr. Hughes.

Mr. Hughes: Your Honor, may I say preliminarily that I will do what I can by way of cross-examination. I have tried in good faith to prepare myself—

The Court: Mr. Hughes, if you do not complete your cross-examination this afternoon we will give you overnight, and we will have Mr. Danbom come back, and you can cross-examine him further tomorrow.

Mr. Hughes: There may be situations arise here that may require us to do some further investigation.

The Court: I am aware of that, Mr. Hughes. I think I am aware of some of the problems that are implicit in this whole thing, and that is why I intend to follow your cross-examination very closely.

Cross-examination.

By Mr. Hughes:

Q. Mr. Danbom, you have been with the FBI nine years?

A. And ten months, yes, sir.

Q. Prior to that, what did you do?

A. Prior to that, I was in the Standard Oil business as a salesman for the Standard Oil Company.

[fol. 2394] The Court: Incidentally, Mr. Hughes, have you a copy of this exhibit?

Mr. Hughes: I have a copy of—what is that exhibit?

—Mr. Greenberg: 949. Prior to the opening of this afternoon's session, the Government transmitted to defense counsel a conformed copy of G-949, and Mr. Hughes now has it in his hand.

The Court: All right.

Mr. Hughes: I do not have any extra copy, your Honor, of Court's Exhibit 2.

The Court: I am not following it from this, because I am not concerned at the moment with exhibit numbers; I am concerned with actual items.

Q. What was the nature of your work with the Standard Oil Company?

A. A salesman, sir.

Q. A salesman of what?

A. Of Standard Oil products.

Q. What kind of products?

A. Oil, gasoline, tires, batteries, accessories.

Q. That is, you went around to filling stations, is that right?

A. Yes, sir.

[fol. 2395] Q. What did you do before that?

A. Before that, sir, I was in the United States Navy.

Q. And before that?

A. Before that, sir, I was a school teacher and a football coach.

Q. And before that?

A. A student.

Q. Were you ever employed by a manufacturer of cans?

A. No, sir.

Q. Were you ever employed by a manufacturer of glass containers?

A. No, sir.

Q. Were you ever employed by a manufacturer of plastic containers?

A. No, sir.

Q. Were you ever employed by a food packer?

A. No, sir.

Q. Were you ever employed by a packer of toiletries and cosmetics?

A. No, sir.

Q. Were you ever employed by a beer manufacturer?

A. No, sir.

[fol. 2396] Q. Were you ever employed by a soft drink manufacturer?

A. No, sir.

Q. Were you ever employed by an advertising agency?

A. No, sir.

Q. Were you ever—

A. May I say at this point I recall I was employed by a candy manufacturer, making candy and selling candy in drug stores.

Q. You didn't tell me about that. When were you employed by that company?

A. About 19—after the war, 1946 and '47.

Q. How long were you with them?

A. I recall about three years.

Q. In what capacity?

A. As a salesman.

Q. Operating in what area?

A. In the South Bend, Indiana, area.

Q. In what area did you operate for the Standard Oil Company?

A. Lafayette, Indiana; South Bend, Indiana.

Q. Was that for Standard Oil of Indiana?

A. Yes, sir.

[fol. 2397] Q. Did you ever work for any person, firm or corporation whose business is the conducting of consumer preference surveys or public opinion surveys?

A. No, sir.

Q. Do you live in the District of Columbia?

A. No, sir. I live in Wheaton, Maryland, which is just outside of the District of Columbia.

Q. So that you do not live in the neighborhood of any of the stores which Exhibit 949 indicates that you visited, is that correct?

A. No, sir.

Q. Were these the first occasions when you ever visited any of these stores?

A. Well, I would say the Woodward & Lothrop department store is a very large store in Washington, and I made many of these purchases there.

Q. It is the largest department store in Washington, isn't it?

A. Yes.

Q. And you made many purchases there?

A. Yes.

Q. Did you ever buy any canned goods there before August or September of 1960?

A. Not that I recall. It is mostly clothing I purchased [fol. 2398] there.

Q. Did you ever buy any ladies' cosmetics there?

A. No, sir.

Q. Any toiletries of any kind?

A. No, sir.

Q. Any household or chemical products?

A. No, sir.

Q. Prior to embarking on these visits to the stores to

which you have alluded, you say that you received some instructions, is that correct?

A. Yes, sir.

Q. Were those instructions oral in writing?

A. The instructions were in writing, sir.

Q. Do you have the written instructions?

A. No, sir, I don't.

Q. Where are they?

The Court: Mr. Greenberg, will you illuminate us as to that?

Mr. Greenberg: If the Court please, we have provided you, Mr. Hughes, with a copy of the written instructions, the only written instructions which exist.

The Court: Mr. Witness, I show you what is Court's [fol. 2399] Exhibit C-1. Are those the instructions you refer to?

(Witness examines document)

The Witness: Yes, these are the instructions.

The Court: You may return that to Mr. Hughes.

(Document handed to Mr. Hughes.)

Q. When did you see these instructions embraced in Court's Exhibit 1 for identification for the first time?

A. I think I saw those about the 25th of August—about the 24th or 25th.

Q. Where did you see them?

A. In the Washington field office of the FBI.

Q. Who showed them to you?

A. My supervisor.

Q. What is his name?

A. Mr. Powell.

Q. Did you and he have any conversation with reference to these instructions at that time?

A. Just the fact I was given an assignment.

Q. That calls for a yes or no answer.

A. Yes, sir.

Q. And consequent upon that conversation, what did you do?

[fol. 2400] A. I went to the Department of Justice for further instructions on what they wanted me to do.

Q. Whom did you see at the Department of Justice?

A. I met Mr. Greenberg and Mr. McManus.

Q. You met and had a discussion with them; is that correct?

A. Yes.

Q. That is, together? They were together with you?

A. Yes.

Q. Can you fix the time of that discussion?

A. That was on a Friday, August 26th. I think that is the correct date.

Q. Was that Friday morning?

A. Friday morning, yes, sir.

Q. And you embarked on your assignment during that day?

A. Yes, sir.

Q. Did either Mr. Greenberg or Mr. McManus give you any additional instructions beyond what is embraced in this piece of paper, Court's Exhibit 1 for identification?

A. No, sir, just to go to these—they named the stores for me.

[fol. 2401] The Court: They named the stores?

The Witness: Yes, sir.

The Court: What did you do, write the names down they gave you?

The Witness: Yes, sir.

The Court: Or did they give you a typewritten list of stores?

The Witness: They gave me a list of stores they wanted me to purchase these items from, and also the money.

Q. Who was it that indicated the stores they wanted you to visit?

A. I don't specifically recall who it was. There were just the three of us there discussing it.

Q. Did you put that in any memorandum of any kind?

A. On a sheet of paper, I think I did.

Q. Do you have that sheet of paper?

A. No, sir, I don't.

Q. Where is it?

A. It is in the office.

Q. Where is the office, in Washington?

A. Washington, D.C.

Q: You have preserved that piece of paper however?

A. Yes, sir.

[fol. 2402] Q. Did you commit anything else to paper on the occasion of that visit with Mr. McManus and with Mr. Greenberg?

A. The lists that I made here, yes.

Q. Do I understand then that part of their instructions was that they gave you a list of products and told you to go out for them?

A. No, sir. The instructions were to purchase items, the same items that were packaged in the same or in two different containers, a glass container and a metal container—the same product.

Q. But I am referring now to your first meeting with these gentlemen, and you have told me that they told you the names of the stores, and you made a memorandum of the stores. Now, what else did they tell you?

A. To bring the products back to their office and identify the products.

Q. Did you make any other contemporaneous memorandum on the occasion of that meeting between you and Messrs. McManus and Greenberg?

A. Well, as I purchased the items I wrote those items. Is that what you mean?

Q. No. I am referring to any memorandum that you may [fol. 2403] have made of your conversations with these two gentlemen other than the list of stores that you have told us you made a record of?

A. No, sir.

Q. So that if I understand you correctly the sum total of your notes of any discussion between you and Mr. Greenberg would be embraced in this memorandum to which you have referred?

A. Yes, sir.

Q. And which is in Washington?

A. That's right.

Q. Was there any reason you didn't bring that memorandum to court?

A. No particular reason, sir, no.

Q. You knew you were going to testify here, didn't you?

A. Yes.

Q. How long have you been with the FBI?

A. Nine years and ten months, sir.

Q. And in your experience, you have made memoranda from time to time of instructions that have been given to you?

A. Yes, sir.

Q. And from time to time you have been questioned [fol. 2404] about such instructions, is that correct?

A. Yes, sir.

Q. And in any event, they are reposing in Washington; is that right?

A. Yes, sir.

Q. Did you at any time subsequent to that occasion make any memoranda of any kind other than what is embraced within Exhibit 949 for identification?

A. Well, I made a list of the products that I purchased and then transcribed my notes.

Q. You made some notes; is that right?

A. I mean the products; yes, sir. As I purchased the products, I copied them down and——

Q. And are those notes in existence?

A. No, sir.

Q. What did you do with those notes?

A. Those are in Washington, too.

Q. But they are in existence, though?

A. Yes, sir.

Q. Whereabouts in Washington?

A. In the field office.

Q. Did you make any other notes of any kind?

A. No, sir.

Q. Did you return to have any subsequent conversations [fol. 2405] with either Mr. Greenberg or Mr. McManus during the period from August 26th to September 6th?

A. You mean, did I meet them again?

Q. Yes.

A. Yes, sir; I did.

Q. And where did you meet with them?

A. In Mr. McManus' office.

Q. And did you receive any further or additional instructions——

Mr. Hughes: I withdraw that.

Q. First, how many other meetings were there between either you and Mr. McManus or Mr. Greenberg?

A. Well, every time I ran out of money, I had to go back and get more money and then identify the receipt.

Q. How much money did you start out with?

A. It was given to me in cash: \$50.

Q. When did you run out of the first 50?

A. At the Safeway store and the Giant store.

Q. Was August 26th your first shopping day?

A. August 26th was the first shopping day.

Q. So you ran out of the \$50 that day; is that right?

A. To the best of my recollection, sir, yes.

[fol. 2406] Q. And then you went back to see Mr. McManus and Mr. Greenberg?

A. Yes, sir.

Q. And when did you go back: on the 27th?

A. On the 26th. No. I didn't go back—the 27th was on Saturday. The 26th I went back.

Q. That is, after—

A. After I purchased the items; yes, sir.

Q. Which stores did you visit on the 26th?

A. The Safeway store and the Giant store.

Q. And about when did you start this—when did you enter the first of these stores? Which one did you go to first?

A. The Safeway.

Q. How long were you there?

A. Approximately one hour.

Q. And that was somewhere on Wisconsin Avenue, was it?

A. Yes, sir.

Q. What was the other one?

A. The Giant food store.

Q. Is that also on Wisconsin Avenue?

A. Yes, sir; about ten blocks farther south.

Q. And how long were you in there?

[fol. 2407] A. Approximately an hour and a half to two hours.

Q. And then you returned to—

A. Yes, sir.

Q. —to Messrs. Greenberg and McManus?

A. Yes, sir.

Q. Did you have any of these products with you when you returned?

A. Yes, sir.

Q. And at that time did they give you any further instructions?

A. Not that I recall. At that time they mentioned that they were going to go to Woodward & Lothrop store and then they named two other stores on Wisconsin Avenue that I was to go to.

Q. Then, if I understand you correctly, upon the occasion of your first visit, you were only instructed to go to those two stores that you visited that day; is that correct?

A. No, sir. I recall that day they mentioned the Giant and the Safeway and Fisher's market and Magrader's market.

Q. All in the nature of either food stores or grocery stores?

[fol. 2408] A. Food stores or grocery stores.

Q. The drug stores did not come into the conversation that first day?

A. Yes, sir. I think they mentioned that I would be going to a drug store later on.

Q. Did they give you the name?

A. Yes, sir.

Q. That day?

A. I don't recall, sir.

Q. That list would reveal that, wouldn't it?

A. It possibly could, sir. I don't recall that, either.

Q. Anyway, have you told us your recollection of the substance of what transpired between you and Messrs. Greenberg and McManus when you returned on the 26th of August and spoke with them? Can you think of anything else that transpired?

A. No, sir. I can't think of anything else.

Q. Did they tell you to do anything else on that day?

A. No, sir. It was around 4 or 4:30. No, sir. I think that was all.

Q. So that when you left that day, so far as you were concerned, was that the end of your assignment?

[fol. 2409] A. No, sir. No, sir.

Q. Had you been given some more money?

A. I think I picked up additional money on the Monday, the following Monday.

Q. How was it left when you left on Friday afternoon?

A. The items were brought back, and I identified them, and I turned the receipt over to Mr. McManus, and I told him I would see him on Monday for additional money, and I would call on the Fisher's market and the Magruder's market to make additional purchases.

The Court: Mr. Danbom, when you talked to Mr. McManus or Mr. Greenberg, you say they told you to purchase—am I correct in this—products that were the same but were packed in glass, were sold in glass containers and sold in tin containers?

The Witness: Yes, sir.

The Court: When they told you about products being the same, did they go any farther? Did they give you any further description of what they meant by "the same"?

The Witness: For instance, tomato juice: if you see tomato juice in jars or tomato juice in a can, purchase that item. If you see—

[fol. 2410] The Court: Did they give you any other examples, do you recall?

The Witness: I don't recall, but I realized that they wanted the same product, packaged in the same—in two different containers. So I just went along the shelf and picked out fruits and syrup—

The Court: Picked out anything that looked to you as if it was the same product? Is that right?

The Witness: Yes, sir.

Q. And on that first visit to Safeway, you went through the entire store; is that correct?

A. Yes, sir.

Q. And picked out what you considered to be compliance with the directions; is that right?

A. Yes, sir.

Q. In the course of going through the store, did you make any notation or memorandum of the articles which did not appear to be moving in more than one type of container?

A. I don't understand the question, sir.

Q. Did you happen to notice corn, for example?

A. In what—

Q. Did you happen to notice it at all?

A. Corn, yes, sir.

[fol. 2411] Q. And that moved in tin cans; is that right?

A. Yes, sir.

Q. All right. Did you make any list of those products which you saw that moved in only one type of container?

A. No, sir. No, sir.

The Court: Are we to take it, then, Mr. Witness, that with the exception of this list that is here, any product sold by this Safeway store that isn't on this list and that moved in either glass or tin, moved only in glass or tins and were not in both?

The Witness: Well, I would say, sir, that I picked out the products on the shelf that I saw packaged in glass and metal.

The Court: Yes, and—

The Witness: I wouldn't say—if I saw corn, I did see corn and it wasn't in glass, I wouldn't purchase the corn.

The Court: So it is a fair conclusion from this, isn't it, Mr. Witness, that you made a thorough survey of the store?

The Witness: Yes, sir.

The Court: You went up and down all the aisles; is that right?

[fol. 2412] The Witness: The shelves; yes, sir.

The Court: And you bought everything that you saw on those shelves that was packaged, as you saw it, in both glass and in tins?

The Witness: To the best of my ability; yes, sir.

The Court: So that as far as that store was concerned, anything that is not on this list and which was packed in either glass or in tins was packed only in glass or only in tins; is that correct?

The Witness: Yes, sir.

The Court: All right. We will take a brief recess at this point.

Mr. Greenberg: If the Court please—

The Court: No. We will take a brief recess.

(Short recess.)

The Court: Did you have something to say, Mr. Greenberg?

Mr. Greenberg: No, your Honor. I would prefer to defer my comments until redirect examination.

The Court: Very well.

Q. Mr. Danbom, I want to be sure that I have one phase of your testimony correctly. Do I understand that Court's Exhibit 1 for identification were the only written instructions of any kind that you had from any source in connection with this assignment about which you are now testifying?

A. Yes, sir. That—

Q. Do I understand that you saw that before your first visit with Mr. McManus?

A. Yes, sir.

Q. And Mr. Greenberg?

A. Yes.

Q. And all other instructions or discussions with reference to this assignment were oral; is that correct?

A. Yes, sir. To the best of my recollection.

Q. And were they all with either Mr. Greenberg or Mr. McManus?

A. Yes, sir.

Q. None of them with your chief?

A. No, sir.

Q. Your chief; whom you heretofore identified?

A. No, sir.

Q. On the first day, according to Exhibit 949, you visited the Safeway store and the Giant supermarket; is that correct?

A. Safeway; yes, sir.

[fol. 2414] Q. And—

A. And the Giant; yes, sir.

Q. And in the Safeway, you spent \$10.01; is that right?

A. Yes, sir.

Q. And—

A. In Giant?

Q. In Giant you spent what on the 26th?

A. \$23.82.

Q. I may have misled you, Mr. Danbom, because the copies of these exhibits I have before me seem not to be in chronological order. Can you tell me how much you spent in Safeway the first day?

A. \$10.01, and then I went back to the Safeway market, I recall, for additional purchases.

Q. Before we come to that, because that was on another day, wasn't it—

A. Yes, sir. I recall. Yes, sir.

Q. On the first day, you also went to the Giant food market?

A. Yes, sir.

Q. And was that also on Wisconsin Avenue?

A. Yes, sir.

Q. How much did you spend there the first day?

[fol. 2415] A. \$23.82.

Q. So that on that first day you didn't really use up the \$50, did you?

A. No, sir. I must have had some money left over there.

Q. So when you went back to see Messrs. Greenberg and McManus, there were discussions about matters other than replenishment of funds, were there not?

A. Yes, sir. I recall that.

Q. Now, give us the substance of that whole discussion. [fol. 2416] A. I recall mentioning a few items. For instance, jam, I said I saw in glass and in cans, and I saw a number of other fruits in cans and glasses. I did not know if I should buy all of the fruits that I could see, or just some of the fruits that come in just cans and glasses.

Q. You say you saw the jam in both glass and cans; is that right?

A. I recall it was on Friday.

Q. Can you remember what kind of jam it was?

A. No, sir.

Q. Did you make a memorandum of it?

A. No, sir.

Q. When you went to Safeway this first day, did you make any kind of contemporaneous notes as you made these purchases?

A. Yes, sir. As I made the purchases, yes, sir.

Q. What did those contemporaneous notes record?

A. They record these notes I made here.

Q. So that they indicated the product, those contemporaneous notes indicated the product and the price?

A. That's right.

[fol. 2417] Q. And are those notes still in existence?

A. No, sir. I destroyed those notes.

Q. Did anybody tell you to destroy them?

A. No. I just—

The Court: What did you do, destroy them after you put it on the sheet?

The Witness: Yes, after I dictated them, I destroyed them.

Q. Did those notes indicate the size or the quantity?

A. No, sir.

Q. Were you told to make a memorandum of the quantity, the size of the container?

A. No, sir.

Q. Nobody gave you any such instruction?

A. No, sir.

Q. Did you make any memorandum of the brand of the product?

A. No, sir.

The Court: You must have on some occasion.

The Witness: On some of those I did, yes, sir, I recall that.

Q. On some of them you did not?

A. Yes, sir. On some I did not.

[fol. 2418] Q. Did you make any contemporaneous memorandum of the approximate shelf display for any particular brand?

A. No, sir.

Q. Did you talk to anybody in the store that day?

A. I recall talking to a shelf boy, and asked him if a certain product came in a glass container.

Q. Do you remember what product you talked about?

A. No, I don't recall the product.

Q. And not recalling the product, you obviously don't recall his answer; is that right?

A. That's right.

Q. Did you make any record of that conversation?

A. No, sir.

Q. Is that the only conversation you had with anybody?

A. No.

Q. Did you identify yourself to anybody in the store?

A. No.

The Court: You did not talk to anybody in management or anybody in charge?

[fol. 2419] The Witness: No, sir.

The Court: At the Safeway store, how large is the Safeway store?

The Witness: It is a large, modern supermarket located in the residential section.

The Court: Is it new, a big, new one?

The Witness: It is comparatively new, yes, sir. I would say it is about four or five years old.

The Court: Do you have any idea how many products are sold in that store, how many different varieties of products are sold in that store?

The Witness: I have no idea, sir.

The Court: Can you give us any estimate? Or have you just no idea?

The Witness: I have no idea of how many products.

The Court: You wouldn't know if it was a thousand, 5,000 or 10,000?

The Witness: Offhand, I have no idea. It has vegetables, and I have no idea.

The Court: Then you wouldn't know how many products were sold in containers of various kinds?

The Witness: No, sir.

[fol. 2420] By Mr. Hughes:

Q. In this first conversation with Mr. McManus and Mr. Greenberg, do I understand that one of the illustrations they gave you of the kind of product to look for was tomato juice?

A. Yes, sir.

Q. What other illustration did they give you of products to look for?

A. I don't recall any other products. I mentioned myself, I said, "What about beets that came in cans or glass?"

Q. Is this the first conversation now?

A. Yes, sir.

Q. You said, "What about beets?" and what did they say?

A. That would be a good product to get.

Q. What other products were mentioned?

A. I don't recall any others, sir.

Q. Does that mean that there was no discussion or that you don't recollect it?

A. Well, the point was that I was to purchase food products that were not refrigerated and packaged in glass and metal containers.

Q. But was there any discussion with you as to specific [fol. 2421] items to look for?

A. No, sir.

Q. Well, this tomato juice was mentioned?

A. Well, as an example he said, "Tomato juice that is used in the home, beans, peaches, whatever you see in cans or glasses."

Q. Was there any discussion between you and them as to the standards that you were to apply in determining whether products were in fact similar products?

A. In the food products line?

Q. Yes.

A. Beets—no, sir, I wouldn't say there was.

Q. For example, did they talk to you about such things as asparagus spears and asparagus tips? Did you have any talk along those lines?

A. I purchased them and I brought them back to them, and I said, "This is what I purchased."

Q. And, so, when you were going through the store and you saw asparagus spears and you saw asparagus tips, you determined for yourself that they were similar and you made a purchase?

A. Similar, yes, sir.

Q. Now, when you returned with these products you told them what you had discovered with reference to jam. What [fol. 2422] did they tell you?

A. To buy the jam, I saw in the can and the jam I saw in the glass.

Q. And you did that?

A. Yes, sir.

Q. And was this in Safeway?

A. I would have to refer to the package—to the notes here (examining document).

Yes, on my return trip to the Safeway store on August 30th, I purchased a can of strawberry jam and a jar of strawberry preserves.

Q. On your return trip, you purchased eleven other items, did you not?

A. Yes, sir.

Q. How come that you did not purchase them on the first visit?

A. I think I had some questions about—I asked about soft drinks and chocolate syrup, I mentioned.

Q. Now, you had some questions and you had some discussions; is that right?

A. Yes, sir.

Q. Does reference to this page of Exhibit 949 refresh your recollection as to those discussions? It calls for an [fol. 2423] answer yes or no.

A. Yes, it does.

Q. And these were discussions with Messrs. Greenberg and McManus?

A. Yes, sir.

Q. And they were in the interval between the first and the second visit; is that right?

A. Yes, sir.

Q. Tell me the substance of those discussions.

A. I remember I asked—I mentioned to Mr. Greenberg and Mr. McManus I saw cranberries in cans and glass, and I saw chocolate syrup in a glass and in a can, and I saw soft drinks in a glass and in a can, 7-Up, and should I purchase items of that sort, and they said, "Yes."

Q. Your instructions had been to purchase any food products that you saw; is that correct?

A. Food products, yes, sir.

Q. And you had some concern as to whether cranberries fell within that category?

A. No, sir, not on that.

Q. Did you have any concern about strawberry jam being within that category?

A. No, sir.

[fol. 2424] Q. But you nevertheless went back and said you saw them and had not bought them; is that right?

A. Yes.

Q. And they told you to go out and buy them; is that right?

A. Yes, sir.

Q. Can you tell me why it was that you did not purchase the cranberries on the occasion of your first visit to the store?

A. No, sir, I cannot tell you.

Q. Your mind is a blank on that subject?

A. I just purchased so many items on that day, I just don't recall. I felt on the second day I would go back and look for additional products.

Q. There is no doubt you did not purchase it on the first day, isn't that so?

A. Yes, sir.

Q. There is no doubt in response to your other products, you said you went around and purchased everything you saw in the food line that you thought were similar products in either glass or cans; isn't that right?

A. Yes, sir.

Q. And you did see these cranberries; right?

[fol. 2425] A. Well, I recall seeing them the second time, yes, sir.

Q. But you told us you recall a discussion with Messrs. Greenberg and McManus about these cranberries on the occasion of your second visit, and I would like to know why it was that you did not purchase them on your first visit if you saw them and later talked to them about it.

A. I don't recall the reason why I did not buy them on the first day.

Q. Did you see Royal Anne cherries on the first day?

A. I saw cherries the first day.

Q. Did you see Royal Anne cherries the first day?

A. Yes, sir.

Q. Did you see them in cans and in a jar—in jars?

A. Yes, sir.

Q. And you did not buy them?

A. No, sir, I did not.

Q. Why didn't you?

A. Because I recall I purchased a fruit for salads on one day, and I thought perhaps that would be sufficient. And I [fol. 2426] mentioned when I got back, should I purchase additional fruits, like cherries, boysenberries in cans and glasses.

Q. But your instructions were to buy samples of every-

thing that you saw that you in your own judgment considered to be similar, isn't that right?

A. Yes, sir.

Q. So in the first instance you really ignored those instructions, isn't that right?

A. No, sir.

Q. Well, you did not buy everything you saw?

A. It was a busy supermarket that day, and I probably looked at the item and did not buy it that particular day.

Q. Well, whether the market was busy or not busy, your instructions were to buy everything you saw; is that right?

A. Yes, sir. And I said, "I can go back to the same store on Monday and pick up additional products."

Q. But you have already told his Honor that on the first day you bought everything that you saw that you deemed to be similar?

[fol. 2427] The Court: Mr. Hughes, hasn't that been gone over sufficiently? What is the point of this?

Mr. Hughes: Well, your Honor, I would really like to know what his instructions were, and I think it bears on his instructions.

Q. I ask the witness again whether it isn't a fact that either Mr. McManus or Mr. Greenberg at some time, and maybe from time to time, mentioned specific products that they asked you to go out and try to find. Is that correct?

A. I don't recall at this time specifically. Now, they may have mentioned cherries, and I looked for cherries, and I got dark cherries, and I got Royal Anne cherries. To me it did not seem significant at the time.

Q. But whether it seemed significant or not, I want your recollection, and, if you haven't any, just say so and I will leave it.

I want your recollection as to whether either one of them at any time or from time to time mentioned specific products and told you, "Go out and look for them and see if they are in glass and cans."

A. I do not have a recollection on that.

Q. You don't have a recollection one way or the other?

[fol. 2428] A. Yes, sir.

Q. In any of the stores that you visited, did you ask any

employee for any product in glass or cans other than this conversation to which you have referred?

A. No, sir.

Q. Is that the only employee of any store to whom you spoke?

A. I spoke to the shelf man in the Giant and asked him the same question, if a certain item is packaged in glass—corn or—as I saw corn on the shelf, or lima beans, or anything; I said, “Does this come in a glass container?” If it were in glass:

Q. You say you spoke to the man in the Food Giant store?

A. Food Giant.

Q. And what products did you ask him about?

A. I don't recall specifically.

Q. Did you make any contemporaneous memorandum of those conversations?

A. No, sir, I did not.

Q. Where are the contemporaneous memoranda you made of all these visits to all these stores?

[fol. 2429] The Court: He has already testified, Mr. Hughes, that he destroyed them when he—

The Witness: When I dictated them.

The Court:—when he dictated this memorandum. Please let us not repeat. We have enough ground to cover already.

By Mr. Hughes:

Q. Mr. Danbom, do you have any memoranda or working notes of any kind, nature or description, other than this list of stores to which you have alluded in connection with this assignment?

A. No, sir.

Q. That is the only document that you have other than Exhibit 949; is that correct?

A. Yes, sir.

Q. And having made 949, you destroyed anything else that you may have had?

A. Anything else. As I dictated them, I destroyed my notes, yes, sir.

Q. Did anyone accompany you on any of these visits to any of these stores?

A. No, sir.

Q. Were all of these visits to the stores over a period from August 26th to September 6th?

[fol. 2430] A. September 6th, yes, sir. September 7th, sir, I recall.

Q. September 7th?

A. September 7th, yes, sir.

Q. And which store was that?

A. Woodward & Lothrop store.

Q. Did you visit any stores other than the stores that are referred to in Exhibit 949?

A. No, sir.

Q. Did you observe whether in the Safeway stores any products other than food products were sold?

A. Yes, sir, there were some products.

Q. Do you recall what those products were?

A. Yes, sir. In my notes, I saw the Breath O' Pine all-purpose cleaner, and I saw a bottle of all-purpose Texize cleaner. I read their labels, and they were used for the same purpose, so I purchased that product.

Q. Those are two items that appear on your August 26th report of the Safeway store visit; is that right?

A. Yes, sir.

Q. What other products did you notice that they sold in the Safeway store?

[fol. 2431] A. I noticed that Safeway sold the Seamper liquid soap for dishwashing that came in a can, and I saw a plastic container of Lux soap for dishes that came in a plastic container.

Q. Did you make any count of the number of items for sale in the Safeway store other than food items?

A. List the number of them? No, sir, I could not.

Q. You couldn't tell his Honor how many such items were on display, could you?

A. As far as soaps?

Q. Yes. Anything other than food.

A. No, sir.

Q. In this visit to the Safeway store, were there any items not on display that you asked for?

A. No, sir.

Q. Is that true in these other stores?

A. In every store I called on, sir, yes, sir.

Q. You confined yourself to items that were on display?

A. On the shelf, open for purchase.

Q. Taking the Safeway store again, can you tell me whether any of the items you listed as having purchased on the second visit were not on display on the first visit?

[fol. 2432] A. No, sir, they were all on display the second visit—the items that were on display the second visit were also on display the first visit.

Q. When you made these purchases, did you make any attempt to purchase comparable sizes?

A. In some instances I did, yes, sir.

Q. And in some instances you did not?

A. I did not.

Q. In those instances you did not, did you make any particular memorandum?

A. No, I did not. No, sir, I did not.

Q. Before visiting the Safeway store, did you make a survey of the kind of neighborhood?

A. No, sir, I did not.

Q. So that your characterization of the neighborhood is just based on whatever observation you made going from the FBI office to the store; is that right?

A. To the store, yes, sir.

Q. You did not make any survey to determine whether there were any restaurants or taverns or schools or hospitals in the neighborhood?

A. No, sir, I did not.

Q. Or any diner, or anything of that sort?

[fol. 2433] A. No.

Q. I think you told us none of these stores was in the neighborhood where you live yourself.

A. No, sir.

Q. I don't suppose you have any idea, do you, of how many supermarkets there are in the metropolitan area of Washington?

A. No, sir.

Q. You couldn't help us out on that at all? You have no idea of how many drug stores there are?

A. I have no idea of how many there are, no, sir.

Q. Were all the stores that you visited in the northwest section of Washington?

A. No, sir. The Safeway, Giant, Magruder's and Fisher's

Market were all in the northwest. The Woodward & Lothrop store is downtown Washington.

Q. Is that in the northwest area?

A. It is considered northwest, yes, sir.

Jumbo Food Market and People's Drug Store is out in the northeast section of Washington, metropolitan Washington.

Q. Is the Jumbo Food Store that you visited in the District of Columbia at all?

[fol. 2434] A. No, sir, it is in Adelphi, Maryland, just over the line.

Q. Is that one of the stores you were told to go to?

A. Yes, sir.

Q. Who told you to go there?

A. Mr. McManus.

Q. Did he give you any indication why he selected that store?

A. I mentioned the People's Drug Store, and then there is a big Jumbo down the street I could go to.

Q. But I am asking you whether he gave you any indication as to why—

A. Yes, he mentioned Jumbo Market. I said, "That's just near People's Drug Store in Adelphi there."

Q. So you went to the Adelphi store?

A. Yes.

Q. That was near one of the drug stores you visited?

A. Near the People's Drug Store, yes, sir.

Q. Did he give you any instructions with reference to visiting that particular store, the Adelphi store?

A. I think he mentioned that that store handles a lot of [fol. 2435] large cans of food products.

Q. That is, he indicated to you some knowledge of that particular store; is that right?

A. The large—

Q. That was a store he knew about and you did not know about; is that right?

A. Yes, sir.

Q. And he indicated to you that it was a store that handled large containers?

A. Yes, sir.

Q. That carried large quantities; is that right?

A. As I recall, yes, sir.

Mr. Hughes: Your Honor, I am sorry to take this time, but it is very difficult.

The Court: That is all right. Go ahead.

By Mr. Hughes:

Q. Was your first visit to the jumbo store on September 2nd?

A. Yes, sir.

Q. And was that where you bought a can of tomato catsup and a bottle of tomato catsup?

A. Yes, sir; a large can and a bottle, yes, sir.

Q. Prior to that visit to that Jumbo store, had you attempted to—

[fol. 2436] The Court: Let me see the bottle of tomato catsup; the bottle and the can.

Mr. McManus: It is a No. 10 can.

The Court: This is a hotel pack.

Mr. McManus: Your Honor, that store he went to is known to retail to consumers. It is a regular retail grocery store, and he did go there, and that is one of the reasons I asked him to go.

The Court: It says on the can:

"A complete line of the finest foods packaged especially for hotels, restaurants, schools and institutions in packages best adapted for commercial serving."

Mr. McManus: That may be so, but it is sold through a retail outlet. In that area there happen to be consumers other than retail that happen to buy it. I am sure Mr. Stokely has no objection. That is why I asked Mr. Danbom to go to that area. There is no question about it, no mystery about it.

By Mr. Hughes:

Q. Mr. Danbom, you made no survey of the neighborhood in which the Jumbo store was, did you, in Adelphi?

The Court: I am going to ask you to hand up the couple [fol. 2437] of different kinds of items I want to look at. I want to look at the olives.

(Handed to Court.)

Mr. Hughes: One is green and one is ripe; is that right?

The Court: One is green and one is ripe; pitted green and ripe olives.

Now let me see the baked beans.

(Handed to Court.)

Mr. McManus: We have got two sets.

The Court: All right. Go ahead, Mr. Hughes.

Q. Did Mr. McManus tell you, in words or in substance, that if you want to that Jumbo market at Adelphi you could get tomato catsup in a can?

A. Yes, sir. And I also recall buying Wesson Oil in a bottle from some store, and I said, "I have seen Wesson Oil in a can, but I haven't run across it."

Q. And he said, "Well, if you go to the Adelphi store you will probably get it"?

A. "You might find Jumbo Food carrying Wesson Oil."

Q. So you went there and you got it; is that right?

[fol. 2437a] A. Yes, sir, that was there.

Q. And have you got the Wesson Oil can?

A. The third from the bottom. I brought that back to the office, and it had a hole in the top of it and it leaked, so we didn't bring it.

[fol. 2438] Q. Was it as big a can as the can that is in front of his Honor?

A. Yes, it was. It was a large—

Q. It was as large as that or larger?

A. It was at least as large if not larger.

Q. Have you got the bottle?

A. The bottle we brought, yes.

The Court: Let us see the bottle.

Mr. Greenberg: Your Honor, the bottle is in our office. We will be very happy to bring it out now. Mr. Hughes said it was not necessary to have it. We haven't offered the bottle, you understand—

Mr. Hughes: I didn't understand that. Is that one of those that is stricken off your list?

Mr. Greenberg: Yes, Mr. Hughes, by virtue of the fact that the can had a hole in it. By reason of the fact that we didn't have a pair, we decided not to put the Wesson Oil in a container—

Mr. Hughes: Your Honor, it appears from the testimony of the witness that the can was at least as large as if not larger than the one on your Honor's desk, and which bears an exhibit number—I don't know what the exhibit number is—and I would like to see the bottle that the witness purchased.

[fol. 2439] The Court: All right. Go ahead with something else in the meantime.

Q. Did you buy anything else, Mr. Danbom, that is not on the table here in the courtroom?

A. Yes, sir. We made some other purchases there.

Q. What other things did you purchase that are not on the table?

Mr. Greenberg: If the Court please, to save time we will make available all the products that we purchased—

The Court: I think this, if I might say so, Mr. Greenberg, is not for the purpose of saving time. It is for the purpose of informing the Court what happened, which is a very different matter. All the products that were purchased ought to be here in the courtroom. If there are any that aren't here, let us get them in here right now.

Let me see the Wesson Oil.

Mr. Hughes: Should I continue, your Honor, while that is—

The Court: Yes.

For the record, here is the Wesson Oil, which has not been marked as yet, but which I am instructing the clerk to mark as soon as I get through with the question.

[fol. 2440] You say that this is the Wesson Oil in glass that you bought, and the Wesson Oil can was as big as or bigger than the cans shown on Stokely's finest tomato ketchup, which is G-1045?

The Witness: Yes, sir.

The Court: All right.

The Witness: Yes, sir.

The Court: Will you mark this, please, Mr. Clerk.

(Bottle of Wesson Oil, marked Government's Exhibit G-1156 for identification.)

Q. At the Giant store, did you say that you bought two different containers of peas? Do I understand that?

A. Well, let's see. Yes. I did, sir.

Q. And do we have them on the table?

A. Yes, sir.

Q. And have you identified them for us?

A. Yes, sir.

Q. And do you remember on which visit it was that you bought them?

Mr. Greenberg: Mr. Hughes, will you show the witness the physical exhibits, because I do believe the physical [fol. 2441] information is contained on them.

The Court: All right.

Mr. Hughes: Without reference to the physical exhibits, you could not—

A. No. I bought this in the Giant store on Wisconsin Avenue on the 26th of August, and I bought this at the Giant store on Wisconsin Avenue on the 26th of August.

Q. And did you talk with any of the clerks when you bought them?

A. No, sir. No.

Q. Did you notice that the Aunt Nellie's refers to them as early harvest sugar peas? Do you notice that?

A. Yes. I notice that.

Q. Do you notice that this other Aunt Nellie's in glass refers to sweet peas and whole onions? Did you notice that?

A. I noticed—

Q. Did you notice that?

A. Yes, sir.

Q. And did you consider them to be comparable items?

A. Yes, sir.

Q. You don't know whether in fact they are comparable [fol. 2442] items?

A. No, sir.

Q. You didn't speak to anybody at Aunt Nellie's about them, did you?

A. No, sir.

Q. Or in the store?

A. No, sir.

Q. Did you say that you found Nescafe in both a bottle and a metal container?

A. Yes, sir.

Q. Have you got that?

A. Yes, sir.

Q. Did you happen to notice whether the Nescafe in the can was an imported item?

A. Did—

Q. I say, did you or didn't you?

A. No, sir; I didn't.

Q. So that as I show it to you now for the first time it comes to your attention that that is an imported item or at least indicates that it is an imported item?

A. Indicates that it is; yes, sir.

Q. And so that you are really unable to say, based on any of your knowledge and observation, whether there is any domestically packed Nescafe moving in a metal container [fol. 2443] ers; is that right?

A. Yes, sir.

Q. That is, yes, sir, you are unable to say?

A. I am unable to say.

The Court: What were the prices of those? Let me see them, Mr. Hughes. I would like to follow these as we go along.

Mr. Hughes: Yes, sir.

Q. Would you furnish that information to his Honor, please?

The Court: It is your position, Mr. Hughes, that this instant coffee is for a continental coffee, that it is an after-dinner coffee as compared to the coffee that we are accustomed to?

Mr. Hughes: Yes, sir, that is right.

A. Yes, sir. The jar of Nescafe in the glass is 39 cents, and the can of Nescafe instant is 79 cents.

The Court: Gentlemen, we are going to close here. It is now 4:30.

Mr. Hughes: Well, your Honor, I was going to say this: I am frank to say I don't know whether this is really preliminary examination in preparation for an objection or whether it is more than that, but—

The Court: Well, Mr. Hughes, I think sometimes it is [fol. 2444] a little difficult to snip these into segments, and

I think that if you are going to cross-examine on this subject, I think you might as well pursue it, because all of this has a bearing as we go through it on my ultimate view of this question.

Mr. Hughes: Yes. Well, your Honor, it seems to me first that enough has been shown on cross-examination to indicate the limited nature of this assignment, the limited nature of the instructions, the limited nature of what Mr. Danbom candidly says he did to make all of this, all of his testimony far below the dignity of a survey and far below the dignity of anything that rises to any real probative value; so that I do press the preliminary objection as to the admissibility of these many containers.

The Court: Well, Mr. Hughes, I am frank to say that if there are in these items purchased in large supermarkets items that are truly comparable, they may have some probative value. I am frank to say to you that items of Nescafe coffee, after-dinner coffee, obviously done in France for 79 cents, and ordinary Nescafe for our use in coffee in America, to me have no probative value at all, none whatsoever.

Mr. Hughes: Well, your Honor, that, I think, brings me [fol. 2445] to this point. I have tried—

The Court: What do you say, Mr. Greenberg? Excuse me just a minute, Mr. Hughes. What do you say is the significance of the Nescafe?

Mr. Greenberg: Your Honor, I think it indicates that similar products use cans and glass containers, that there is some feeling that coffee of this type can be marketed in a metal can, and it shows common usage.

I would like to say, your Honor—

The Court: I could not imagine two products more—well, I could certainly imagine two products more different. That is not a very accurate statement. But I certainly can't imagine anything less comparable than these two.

If you are trying to establish a line of commerce or part of a line of commerce, I can't imagine what probative value these have in establishing that result.

Mr. Greenberg: Your Honor, there has been testimony and documents which have indicated that it is feasible to use a metal can for instant coffee, and, in addition, that the

defendants had strenuously and very efficiently attempted to sell such metal cans for instant coffee.

[fol. 2446] Here, your Honor, is an indication that the same type of coffee has been packed in both.

The Court: Do you know anything about the respective qualities of these coffees and the problems of packing them? Are you prepared to produce any evidence to that effect, except that they are both coffee, one grown in Turkey and the other in Venezuela or Guatemala, with entirely different properties, with entirely different characteristics, with entirely different taste?

Mr. Greenberg: I would like to direct your Honor's attention to the testimony of a witness during our last session which indicated that Continental Can or some other company had shipped instant coffee in a can to sell to Africa, and I do say this, your Honor, that these particular exhibits are not the best exhibits we have, admittedly.

The Court: No. I quite agree.

Well, the point is this—

Mr. Greenberg: There are diced carrots in cans and glass, apple juice and so on.

The Court: I am not talking about diced carrots at the moment. I am talking about coffee.

Mr. Greenberg: If the Court please—

[fol. 2447] The Court: Are you telling me that I am expected to say to myself that extra large California green ripe olives are the same as Aunt Nellie's selected Spanish olives and have the same general characteristics, because there was some testimony here, as I recall it, that you could pack ripe olives in cans but you couldn't put the other kind of olives in cans, or vice versa.

Mr. Greenberg: If the Court please, there is a deposition of a company down in Tampa, Florida, which I think indicates that Spanish imported olives have been put in a can, and all I am trying to say is, your Honor, that we are going to have depositions read into the record by the defendants with references to a lot of products, and while we may not have a comparable exhibit obtained from a store in Washington on that type of olive, still we assert that companies have used cans for that type of olive, and I think it is borne out in depositions and may be borne out—

The Court: Is this done in rebuttal or in the case in

chief, because if we are relying on the defendants' deposition, and you are presently attempting to meet the defendants' deposition, it seems to me you gentlemen are away ahead of yourselves. I did not know what the depositions contain—

[fol. 2448] Mr. Greenberg: I did not mean to state, your Honor, that that was our only purpose. I was merely trying to state that these exhibits may have future utility, but I reiterate—

The Court: I will tell you what we are going to have to do with these exhibits tomorrow. I am certainly not going to let this mass of stuff in just in a bulk this way. Enough has been illustrated this afternoon, and that is that I will admit things in. I notice here Hot-Shot Bug Killer, can and bottle.

It looks to me—and I am not going into it now—as if these were roughly the same type of product. If you have got something of that nature, then perhaps some selective basis might be used for indicating that in this particular instance there is a Hot-Shot Bug Killer in a bottle and a Hot-Shot Bug Killer in a can and they are both equally Hot-Shot, but apart from that—and there may be many other instances—I am not going to let this stuff in in bulk, not going through item by item and deciding what is comparable, at least on its face, and what is not comparable.

On that basis, it may be tonight you will want to go [fol. 2449] through and comb through the selections and eliminate the stuff that you think that I think would not be comparable, and then we will have a simpler proceeding tomorrow. I suggest you do that and let us know what, if anything, you decide to eliminate in the morning.

Mr. Greenberg: We will do that, your Honor.

Mr. Hughes: Your Honor, the cross examination thus far has certainly been without the benefit of anyone seeing any of these stores, and really represents what we have been able to piece together rather rapidly viewing this material.

I would say that so far as what Mr. Danbom did—that is, his explanation generally as to what he did—perhaps there won't be too much more but I am loathe to leave this whole subject, your Honor, unless and until we have felt we have had an opportunity to conduct some sort of an

examination of the stores where these purchases were made, and while I am perfectly willing to go ahead and do the best I can tomorrow in pursuance of your Honor's suggestion—

The Court: Mr. Danbom will be subject to recall, if need be, or if you have an investigator of your own; a man of [fol. 2450] your own who went to the stores, you can put him on and have him testify.

Mr. Hughes: We haven't done that, obviously.

The Court: I understand that. I will give you an opportunity to do that, if you wish.

Mr. Hughes: The point is we may feel impelled to ask your Honor for further time on cross examination.

The Court: All right. But in the meantime I don't know how much of this you have had a chance to examine.

Mr. Johnson: We haven't. We have had practically no opportunity to examine it, but there is another problem that I have noticed in trying to—in the little that I have looked at, in many of these cases both weights and qualities have been obscured by the stickers.

The Court: I have noticed that, too, which rather concerned me, because it seems to me that the question of relative quality, particularly when there is a large spread in price, might bear on the subject. But I can't solve that this afternoon.

I think you gentlemen might want to examine this stuff, [fol. 2451] and, of course, it will be available here, and there is no reason at all it should not stay in the courtroom. The courtroom is locked when people leave tonight. Nobody is going to walk off with the bacon, literally or figuratively.

Mr. Hughes: Your Honor, I think it would be helpful—we will proceed as far as we can, in accordance with your Honor's program—if, after that—we will go as far as we can, but that we be given a day to see through these things.

The Court: We will see what will happen tomorrow.

All right, gentlemen, 10:30 tomorrow.

(Adjourned to October 4, 1960, at 10:30 a.m.)

[fol. 2452]

New York, October 4, 1960, 10.30 a.m.

Trial resumed

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: When we rose last night, I asked counsel to give consideration to the grocery store we have on the table here, and how we would handle these exhibits with the purpose of saving as much time as possible. Are there any suggestions? Mr. McManus?

Mr. McManus: Well, your Honor, first we did what you suggested, and we did exclude certain exhibits that we thought were probably not comparable.

The Court: Very good. That gets our volume down somewhat, at least.

Mr. McManus: Your Honor, I don't know that it would be—of course, we will be glad to put Mr. Danbom back on the stand for any cross examination, but we have the [fol. 2453] products paired off individually and could go through them rapidly and exhibit them to the Court to show why we consider them to be comparable.

The Court: Well, there are two ways of doing that. One is to put Mr. Danbom back on the stand and have Mr. Hughes go through these exhibits in terms of the offer that was made, or have you do it.

Now, it doesn't really, it seems to me, make any material difference who takes the laboring oar here in a non-jury case of this character.

Mr. Hughes, have you got any thoughts on this subject?

Mr. Hughes: Well, your Honor, I had some additional general cross examination, but it seems to me that the burden of demonstrating to your Honor the probative value of these groceries is upon the government, and therefore I would think that any attempt to move them into evidence should be the government's responsibility.

The Court: All right. I think that may be right.

Mr. Hughes: But you do—

The Court: You may be right.

[fol. 2454] Mr. Hughes: I can either continue with this general cross examination now, or I can suspend—

The Court: Well, I don't think a continuation of the general cross examination would do any good at the moment. It would seem to me that we now have an offer of the

report of Mr. Danbom, outlining or listing the various purchases that he made.

Now, plainly, Messrs. McManus and Greenberg, you intend to follow that up with an offer of the actual items that were purchased.

Mr. McManus: That's correct, your Honor.

The Court: Now, I suggest that we go through the items that were purchased, either with Mr. Danbom, or maybe Mr. Danbom—it is not necessary for him to be on the stand—

Mr. Greenberg: If the Court please, each of these physical exhibits contains a label which indicates the store the physical exhibit was purchased in and the date. We believe that it is unnecessary to call Mr. Danbom back because we have submitted the report of the agent and we will offer each of these exhibits—

The Court: All right. Now—

Mr. Greenberg:—at the present time.

[fol. 2455] The Court: All right. In the course of the offer what you will do, in each case you will describe the item and, in essence, the theory on which you say it is comparable.

Mr. Hughes: Your Honor, there may be specific questions addressed to Mr. Danbom with respect to some of these. The pattern may become clear, in which event, after—

The Court: Well, I think it would be as well to have Mr. Danbom on the stand. He can as well sit there as he can sit in the courtroom.

Will you resume the stand, please, Mr. Danbom. Then if it becomes necessary to question him during the course of the offer, he will be available and we won't have to get him up again.

I will say that I will not rule on those as we go along. What I will do is reserve on the entire offer, pending further cross examination by Mr. Hughes of Mr. Danbom, and pending any comments which Mr. Hughes may wish to make with respect to the given items as they go in.

Mr. McManus: Yes, your Honor.

The Court: Now, Mr. Hughes, again—sit down, Mr. Danbom.

[fol. 2455a] Mr. Hughes, as we go along, from the standpoint of your presentation, would it be more effective from your point of view to comment on these items individually or to reserve your comments to the conclusion?

[fol. 2456] Mr. Hughes: I think we will reserve the right—

The Court: You will reserve, all right.

Mr. Hughes: We may want to ask questions, but we will reserve any comments that we wish to make. We may want to address questions to the witness.

The Court: I see. All right. Well, let's proceed along those lines.

Mr. Greenberg: If the Court please—

The Court: Just one minute, please.

Incidentally, gentlemen, have you supplied the defense with a list of the exhibits that are out?

Mr. Greenberg: Yes, we have, your Honor. I transmitted a list to Mr. Johnson this morning.

The Court: As I see it—and I think this ought to go in the record—of all the exhibits which have been marked for identification, and which are on the table before the Court, all of which, as I understand it, are referred to in—what is the exhibit number?

Mr. Hughes: 949, your Honor.

The Court: 949?

Mr. Hughes: Yes.

The Court:—Exhibit 949 for identification, which has been offered, which is the list prepared by Mr. Danbom, [fol. 2457] the following exhibit numbers have been withdrawn from the offer by the Government:

G-1021 and G-1020; G-977, G-976; G-1006 and G-1007; G-1022 and G-1023; G-1033 and G-1034; G-1059; G-1082 and G-1077.

Mr. Greenberg: Your Honor, the Government offers into evidence Government's Exhibits 951 and 950. Your Honor, these exhibits contain tomato juice. One is a metal can and one is an ordinary glass container. These physical exhibits, along with the others, your Honor, indicate the results of competition in action.

The Court: All right. Well, that is the general theme on which you are relying here, is it not?

Mr. Greenberg: That is correct, your Honor.

The Court: Specifically, you claim that these two items are substantially the same product.

Mr. Greenberg: Exactly, your Honor.

The Court: And that is 950 and 951.

Mr. Greenberg: That is correct.

Will you desire me to hand these up to your Honor?

The Court: I think it would be as well if I at least in the beginning looked at these things myself, to get an idea what they look like.

[fol. 2458] Incidentally, these exhibits that have been marked, have they the price on?

Mr. Greenberg: No, your Honor, except in so far—

The Court: I know the list shows it.

Mr. Greenberg: In so far as the list shows it. Some of them have the normal price charged by the grocery stores, which were fixed by them in the regular course of their business.

Mr. Hughes: When you say the "normal price charge," what do you mean by that?

Mr. Greenberg: I withdraw the word "normal." The price charged.

The Court: Whatever is the price label, the price in the store, is what Mr. Greenberg means.

Mr. Greenberg: That is correct.

The Court: Or the price stamped.

Let me ask you this as we go along. I think another thing you might tell me is what is the relationship, roughly, in terms of quantity?

Mr. Greenberg: Well, your Honor, we have not noted the quantity contained in each of these containers. I believe the testimony of Mr. Danbom yesterday indicated that in some instances he attempted to obtain roughly similar [fol. 2459] sizes, but in other instances he did not.

The Court: Yes, I understand that.

Now this is one quart, for instance, I note. That is the glass jar, which is 951, and this would be one quart 14 fluid ounces.

How many fluid ounces in a quart, Mr. Hughes?

Mr. Hughes: I will have to ask someone more learned than I.

The Court: Professor Handler, what about you? How many fluid ounces in a quart?

Mr. Handler: 32.

Mr. Hughes: I will stipulate to that, your Honor.

The Court: All right, so much for that.

Mr. Hughes: Your Honor, I have some questions.

LAURENCE A. DANBOM resumed.

Cross-examination.

By Mr. Hughes:

Q. Mr. Danbom, you never worked for Libby's?

A. Pardon me, sir?

Q. Did you ever work for Libby's?

A. No, sir.

Q. Did you ever work for the Ritter Company?

[fol. 2460] A. No, sir.

Q. Were you in touch with anybody at Libby's in connection with this assignment?

A. No, sir.

Q. Were you in touch with anybody from Ritter's?

A. No, sir.

Q. You made no inquiries of any kind of them; is that correct?

A. Yes, sir.

Q. Made no attempt to find out from anyone in Libby's why it packs that particular exhibit in a metal container?

A. No, sir.

Q. And no attempt to find out from Ritter's why it packed that particular product in a glass container?

A. No, sir.

The Court: Would your answers, Mr. Danbom, to the questions Mr. Hughes just asked you, if asked with respect to the manufacturers of the other products, be the same?

The Witness: Yes, sir.

The Court: All right.

Q. And that would be true with reference to every single [fol. 2461] product?

A. Yes, sir.

Q. That you are to be questioned about?

A. Yes, sir.

Q. Did you make any observation with reference to the quantity of Exhibit 95—

The Court: Call it Libby and Ritter.

Q. —of the quantity of the product in the container as you bought it?

A. Just for my own personal reason I noted the quantity of the canned tomato juice.

Q. You noted that as you bought it?

A. Yes, sir.

Q. Did you make any record of it?

A. No, sir.

Q. Can you tell me now what the quantity was?

A. I don't recall. His Honor just said 14—

Q. No, but as you sit there, do you recall that quantity?

A. No, sir.

The Court: Well now, what difference does it make, Mr. Hughes, if he recalls the quantity, if the quantity is on the can?

Mr. Hughes: Well, it may be in some instances, it may [fol. 2462] not be in other instances. There are about 200 articles here:

Q. Now, did you observe the amount of shelf space devoted to this Libby's in this type of can at the Safeway store?

A. I noted where it was sold on the shelf, yes, sir.

Q. Did you note the amount of shelf space devoted to this particular display of food?

A. Yes, sir.

Q. And can you give us an approximation of what the amount of that shelf space was?

A. I don't recall now.

Mr. Greenberg: If the Court please, the Government would like to note an objection for the record. We believe counsel is going outside the scope of the direct examination and should not lead the witness in this direction.

The Court: Overruled.

Q. Did you note the amount of shelf space devoted to the display of the Ritter's tomato juice, a sample of which you bought?

A. Yes, sir; I did.

Q. Can you tell us how much was devoted to that article? [fol. 2463] A. I don't recall now, or at the time it didn't occur to me, didn't seem very much.

Q. Did you make any note of it?

A. No, sir.

Q. Did you make any note of whether there were any other brands of tomato juice in glass?

A. No, sir.

Q. That is, you can't tell me now whether there were any other tomato juice in glass, any other brands of tomato juice in glass?

A. No, sir. I bought the can of tomato juice in the can, and I saw the bottles of tomato juice in the bottle, and I purchased tomato juice in cans and bottles.

Q. Do you have any idea of whether there were any differences in the preparation of these two products?

A. No, sir.

Q. And you have no information as to what the quantity of this Libby's packed in cans was in inventory in that store on that day?

A. No, sir.

Q. Now would you have any idea of the quantity of it in any store in Washington that day?

[fol. 2464] A. No, sir.

Q. Or metropolitan Washington?

A. No, sir.

Q. Or in the United States?

A. No, sir.

Q. And would that be true of Ritter's on that day?

A. Yes, sir.

The Court: With respect to the questions that Mr. Hughes asked you, would that apply to all the products purchased on that day?

The Witness: Yes, sir; your Honor.

The Court: The same answers you would give with respect to those products.

The Witness: Yes, sir.

Q. Do you have any information as to the quantities of this Libby's packed in cans, sold in Washington on that day or any day?

A. No, sir.

Q. Or over any period of time?

A. No, sir.

Q. Would that also be true of the Ritter's?

A. Yes, sir.

Q. Would that also be true of any of the other products?

[fol. 2465] A. Yes, sir.

Q. That are on the counsel table?

A. Yes, sir.

The Court: In other words, Mr. Witness, all that you did was to purchase specific items that you thought were comparable?

The Witness: Yes, sir.

The Court: You have no notes or observations to give us as to the shelf space occupied, the number of such items that were in the store, the sale of such items in the store or anywhere else, or the amount sold, or any figures, in terms of quantities; is that right?

The Witness: Yes, sir.

The Court: All right.

Q. Do you know where this Libby's was packed?

A. No, sir.

Q. Do you know where Ritter's was packed?

A. No, sir.

Q. Do you know whether as to these articles or any articles the pack was an experimental pack?

A. No, sir.

Q. Do you know whether as to these articles or any articles, you were purchasing obsolete stock?

A. No, sir.

[fol. 2466] Q. And can you tell me now, as you sit there on the witness stand, whether any of these articles which you purchased that day, in the type of container you purchased them in, are still being marketed by their manufacturer in that same type of container today?

A. I couldn't tell you that, no, sir.

Q. And can you tell me the reason or give me any reason why any of these articles were packed by the packer in the type of container that they are packaged in?

Mr. Greenberg: Your Honor, the government feels that it must note another objection for the record. Counsel's questions are argumentative. They are arguing the theories of his case. They are not seeking to probe the witness' knowledge.

The Court: I don't know why anybody can't argue his case by asking questions of the witness as to what he knows. There is no objection to doing that.

Mr. Greenberg: I don't believe a foundation has been laid for any of these questions.

The Court: Overruled.

Q. Now, as to food products, did you observe whether—
[fol. 2467] The Court: I might say, Mr. Greenberg, that is often the very best way of arguing your case.

Q. As to food products, did you observe whether any of the same products that you purchased were sold in the same store in frozen form or in dried form?

A. I didn't take notice, sir.

Q. Did you notice in Safeway, for example, whether they sold fresh meat?

A. I passed the meat counter, yes, sir.

Q. Do you know whether they sold fresh vegetables?

A. Yes, sir.

Q. Do you know whether they sold fresh dairy products?

A. Yes, sir.

Q. And you have no idea of the quantities of those products—

A. No, sir.

Q. —sold?

A. No, sir.

Q. And you have no idea of the quantities of any of these products in frozen form that may have been sold by that store that day or on any other day?

A. No, sir.

Q. And that would be true of all the stores that you [fol. 2468] visited?

A. Yes, sir.

Q. And I don't suppose you have any knowledge or information as to how this tomato juice in this can was filled, do you?

A. No, sir.

Q. And do you know anything about the method by which the tomato juice in the exhibit bottle was filled?

A. No, sir.

Q. Would that be true of all the food products?

A. Yes, sir.

Q. Would it be true of the other products?

A. Of the drugs?

Q. Yes, sir.

A. Yes, sir.

Q. Drugs, toiletries?

A. Yes, sir.

Q. Cosmetics?

A. Yes, sir.

Q. Household items?

A. Yes, sir.

Q. Did you make any attempt to determine the quality of any of the products which you purchased?

A. No, sir.

[fol. 2469] Q. And did you make any attempt to ascertain whether the contents of the canned goods corresponded to the labels on the goods?

The Court: What do you mean by that, Mr. Hughes?

Mr. Hughes: Well, some of these labels, your Honor, may show a given size of the contents of the—

The Court: Well, Mr. Hughes, now we aren't going into that.

Mr. Hughes: Well, your Honor—

The Court: If you have any evidence that you want to produce, or if you can produce any evidence that any of these items are in effect frauds on the public, you can do so. But this man obviously didn't open—did you open any of the cans?

The Witness: No, sir.

The Court: No. All right. Or any of the packages? You didn't open any of the stuff at all?

The Witness: No, sir.

By Mr. Hughes:

Q. And, incidentally, were any of these items that you [fol. 2470] bought on specials the day that you bought them, do you know?

A. I don't recall, sir.

Q. You just don't know one way or the other?

A. Yes, sir.

Q. You made no note of that?

A. I made no note of that, sir.

Q. And are you in a position to tell us whether any of these items were processed by some sort of heat sterilizing process?

A. No, sir.

The Court: Mr. Hughes, look: he has said repeatedly that he doesn't know anything more about these things except that he purchased the cans from the shelf of two things that looked as though they were the same. I don't see any reason for going beyond that with this witness.

Mr. Hughes: I agree with you. I think it is transparently clear, your Honor, that the sort of things that we consider that bear upon the relevance and admissibility of these products were things as to which this witness is not knowledgeable.

The Court: All right.

Now, do you have anything further about the tomato [fol. 2471] juice?

Mr. Hughes: Your Honor, we are at the point where your Honor was about to rule on the admission of these two specific items.

The Court: Well, I am going to reserve ruling on admission until we conclude with the list of things.

Mr. Hughes: Very well.

The Court: I am not going to attempt to rule each time as they go along. I am going to see the whole picture, and then I will make a ruling.

Mr. Hughes: Your Honor, it seems to me that if we are right in our basis of objection, it may save a considerable amount of time if your Honor—

The Court: Well, let me say this to you, Mr. Hughes: It seems to me that what you are saying goes to the weight of this evidence. If, in a large store, as to these two things, or these two items of tomato juice, one is packed in tin in a roughly comparable amount, it is at least relevant. The weight to be given to it is something entirely different.

My present inclination is to take it without saying what weight I ascribe to it. It certainly is some evidence, put in an entire picture, that indicates that tomato juice can be [fol. 2472] packed in tins and glass.

Now, the extent to which that can be done, or the factors that enter into it, is another matter.

Mr. Hughes: Your Honor, addressing myself to these two specific exhibits, then, I object to them on the ground that they are incompetent, irrelevant and immaterial; that they are no proof of competition between cans and glass in any Section 7 sense; that one of the avowed purposes for offering these exhibits was in some manner to reflect what

Mr. Cheney, their own witness, has testified to; that none of the exhibits refute or even tend to refute any evidence that he gave; that the burden is upon the government to establish its case; that it is not upon us to disprove it, and that we have shown sufficiently, it seems to me, that Mr. Danbom was performing—and I say this with due deference to him—nothing more than a clerical function in going to these stores, making the purchases merely as a clerical matter, without regard to any of the factors that have to be known and have to be taken into account in determining why products move in a particular way.

No one has ever disputed, least of all ourselves, that you [fol. 2473] can go into a supermarket and you can find a product in almost any type of container which you can think of, but that is, it seems to me, utterly without significance, unless you know all of the other information with reference to that container, such as the—

The Court: No. It may be, Mr. Hughes, that it is of minimal significance without the factors that you talked about, but because something is of minimal significance or even, it could be said, if it were insignificant in the picture, that doesn't mean it is either irrelevant, incompetent or immaterial, and, your objection is overruled.

As a matter of fact, while we are going on, I will admit the tomato juices.

(Government's Exhibits G-950 and G-951 for identification received in evidence.)

Mr. Hughes: Your Honor, I think it will expedite this whole process, if Mr. Greenberg really intends to offer them all, to offer them all and we will note the same objection.

The Court: Well, the only point is this: I am ruling on the tomato juice because I think the tomato juice is roughly comparable. I don't know what the rest of this stuff is. [fol. 2474] Some of it has been eliminated.

If you are willing to have it all go in under my general ruling, that's fine. I don't want to prejudice your rights to object to any specific item, that's all, on the ground that you say they are not comparable at all; you are trying to compare oranges and lemons.

Mr. Hughes: One of the problems, it seems to us, your

Honor, is that you are really not in a position, even the Court is not in a position, to determine whether they are comparable without all of the other facts and circumstances.

The Court: Oh, yes. I am in a position to say on the surface they are reasonably relevant and neither incompetent nor immaterial, without going to the weight to be given. I can certainly do that item by item.

Now, if you would wish to state your objection to the whole mass on the same basis, I will rule.

Mr. Hughes: May I have a moment, your Honor.

Your Honor, I think I will adhere to my original position, and that is that we will object to the whole mass upon all [fol. 2475] the grounds that I have indicated to your Honor.

The Court: Very good. So your objection is overruled.

Mr. Hughes: Does this also mean, your Honor, that you have overruled our objection to Mr. Danbom's testifying at all?

The Court: Oh, yes, I have overruled your objection.

Mr. Greenberg: If the Court please, may I ask Mr. Hughes if he has any objection to Government's Exhibit 949, which has been marked for identification?

Mr. Hughes: Yes, the same objection.

Mr. Greenberg: Government offers G-949.

The Court: I think what you ought to do before you put in 949 is to eliminate from 949, strike from it physically, the items which you have withdrawn.

Mr. Greenberg: We have done so, your Honor.

The Court: All right. You have done so. The objection is overruled to 949.

(Government's Exhibit G-949 for identification received in evidence.)

[fol. 2476] Mr. Greenberg: Your Honor, I have just a few questions of Mr. Danbom. If I may, I would like to ask them at this time.

The Court: Very good.

Now, with reference to the physical marking of these things, I don't propose to do it in the courtroom. I think we will reserve the actual physical marking until recess. But I think that the record ought to show the actual num-

bers that you are presently offering, Mr. Greenberg, so that we will know what numbers I have ruled upon.

Mr. Greenberg: Your Honor, at a convenient recess we will read the numbers into the record.

The Court: All right.

Mr. Hughes: Your Honor, I am not sure whether the record is clear or not that there is the same objection to Exhibit 949.

The Court: Yes, I understand that.

Mr. Greenberg: May I proceed, your Honor?

Redirect examination.

By Mr. Greenberg:

Q. When you were in the process of buying the various physical exhibits on display, were you told how much money you can spend?

A. At that particular store?

[fol. 2477] Q. At all the stores.

A. No. No, sir, I was not.

Q. Was the figure \$150 ever mentioned to you?

A. It was mentioned that we have \$150 to spend, but if we needed more—but—

Mr. Hughes: May I have the last question and answer?

The Court: Yes.

(Record read.)

The Court: If you needed more, what, could you get more?

The Witness: We could get more.

By Mr. Greenberg:

Q. Was there any financial limit put upon you sir?

A. No.

The Court: Anything further?

Mr. Greenberg: We have nothing further.

Mr. Hughes: Yes, we have some more, your Honor.

The Court: All right, Mr. Hughes.

Recross examination.

By Mr. Hughes:

Q. Mr. Danbom, do you have Exhibit 949 for identification in front of you?

[fol. 2478] No, sir, I don't.

The Court: Will somebody supply the witness with a copy of it.

Do you have it?

The Clerk: Yes, your Honor.

By Mr. Hughes:

Q. Mr. Danbom, you will observe that in the lower right-hand corner there have been numbers placed upon that exhibit. Do you see them in the lower-right-hand corner, consecutive numbers?

A. Yes, sir.

Q. And—

The Court: You mean typewritten?

Mr. Hughes: No, just in pencil.

The Court: In pencil?

Mr. Hughes: Yes.

The Court: Oh, are you referring to G-925?

Mr. Hughes: I am referring to Exhibit G-949.

The Court: No. I understand that. But what is the figure you refer to?

Mr. Hughes: Well, your Honor, so that it would be easy to examine with reference to this exhibit, before the session today I agreed with Mr. Greenberg that I could mark those [fol. 2479] pages so that in questioning the witness about—

The Court: What I am trying to find out, Mr. Hughes, is what we are doing here, so I understand what is going on.

Mr. Hughes: Yes.

The Court: Let me see that a minute.

I see. Yes. In other words, you are now referring to G-949 at the lower right-hand corner?

Mr. Hughes: No, sir, I am referring to the penciled numbers, 1, 2, 3 and 4 and consecutively, in the lower right-hand corner, with a circle around it.

The Court: Oh, I see. Very faint.

Mr. Hughes: Yes, it's a very faint number. And may the record show that I placed that numbering on the exhibit.

By Mr. Hughes:

Q. Now, Mr. Danbom, would you take page 9 of that exhibit, as I have marked it. Do you have that in front of you?

A. Yes, sir.

Q. And do you see up in the upper right-hand corner the word "Date" and then the date 9/1/60?

[fol. 2480] A. Yes, sir.

Q. And then do you see in the lower right-hand corner the date dictated, 9/1/60?

A. Yes, sir.

Q. Now, is there any significance in having two spaces for dates?

A. No, sir.

Q. So that the date at the top and the date at the bottom, do they always correspond?

A. Yes, sir.

Q. And do you see, towards the bottom, the legend "File number"—and I am again referring to page 9—

A. Yes, sir.

Q. —followed by the letters "WFO-60-580"? Do you see that on page 9?

A. Yes, sir.

Q. Can you tell me the significance of the letters "WFO"?

A. Yes, sir. Washington Field Office.

Q. And what is the significance of the number 60-580?

A. That is the number of the case that was assigned to me to work on. That is our file number, field number case. [fol. 2481] Q. I see. And does that mean that the file of the Washington field office has that number?

A. Yes, sir.

Q. And does that mean that there is a Washington field office file?

A. Yes, sir.

Q. And where would that file be—in the Washington field office?

A. Yes, sir.

Q. You don't have it here?

A. No, sir.

Q. And now would you turn to page 1 of that Exhibit 949, and you see where it says "File number WFO-60-580"?

A. Yes, sir.

Q. Followed by another dash, and the number 11?

A. Yes, sir.

Q. What is the significance of the -11 which appears to be added to the file number in that case?

A. That is the page or the serial of that file, the serial number of the file.

Q. Well, page 9 does not have the -11; is that right?

A. Yes, sir.

[fol. 2482] The Court: Mr. Hughes, what is the relevance of this? What is the significance of this inquiry?

Mr. Hughes: Well, your Honor, I am trying to find out—

The Court: How can this possibly have any bearing on this matter? If you can tell me, I would be interested.

Mr. Hughes: I think in a few minutes I will come to what I think—I don't know that it has any significance, but I want to find out myself.

The Court: Well, make it short, because I am not going to give you much more latitude on this kind of cross.

Mr. Hughes: All right, sir.

By Mr. Hughes:

Q. Now, would you turn to page 14. Do you see that?

A. Yes, sir.

Q. And do you see that following the file number, 60-580—

A. Yes, sir.

Q. —there had been a number, but there is an erasure?
[fol. 2483] A. Yes, sir.

Q. Did you make that erasure?

A. No, sir, I didn't.

Q. Who did?

A. The steno, I think, who had written it. I know she erased those numbers. The stenographer erased those.

Q. Did you tell her to?

A. I said we wouldn't need that number on the copies of these lists. We wouldn't need the number.

Q. Well, on some of them you left the number on, didn't you?

A. Because—yes, sir. Two girls typed up these lists, and one girl left them on and the other girl started—I said, "Well, just eliminate that. They are of no significance."

Q. On how many of these did you cause that erasure to be made?

A. On five pages.

Mr. Greenberg: If the Court please, may we at this juncture know the purpose for this line of questioning?

The Court: Well, I think the Court would like to know the purpose of the line of questioning. It doesn't seem to [fol. 2484] me to make any conceivable difference in this case. What are you trying to get at?

Mr. Hughes: I would like to know why there was an erasure.

The Court: Well, I don't care whether there was an erasure or not. It couldn't possibly affect this witness' testimony. It seems to me we are just wasting time on this line of cross examination.

By Mr. Hughes:

Q. Were those erasures made before these papers were delivered to Mr. McManus and to Mr.——

A. Yes, sir. We made those in the Washington field office:

Q. Was it made on all the copies?

A. On all three copies, yes, sir.

Q. Now, in connection with this assignment, Mr. Danbom, did you prepare any writing of any kind in connection with the assignment or referring to the assignment in any way, other than Exhibit 949 in evidence, and your notes that you testified were in the field office in Washington?

A. No, sir.

Q. Did you have any communications of any kind, [fol. 2485] written communications, with Mr. Powell, your chief?

A. No, sir.

Q. When you went to any of these stores, did you have a notebook with you?

A. No, sir, I didn't. I did not.

Q. That would be true of all the stores you visited?

A. Yes, sir.

Q. And referring back to Exhibit 949, you will observe, taking for example, page 1, that there is a legend: "It is to be noted that a number of items were purchased in the smaller size in the interest of economy." Do you see that?

A. Yes, sir.

Q. Whose suggestion was that?

A. Well, I mentioned it to Mr. McManus. I said, for instance, olive oil I saw in different sizes and I purchased the smaller size because it would save a little money.

Q. And what did he say to that?

A. "Fine. Very good."

Q. And was that a conversation that you had on the occasion of your second visit with him?

A. When I returned that evening, yes, sir.

[fol. 2486] Q. Now, running through these pages of this exhibit, you will find a similar notation from time to time. Do you observe that?

A. Yes, sir.

Q. And did you have any further conversations with Mr. McManus with reference to that subject?

A. No, sir.

Q. Just in one conversation after your first visit to Safeway?

A. Yes, sir.

Q. Now, you went to the Woodward & Lothrop department store on four occasions; is that correct?

A. Yes, sir.

Q. And when was the first occasion you went there?

A. On September 1, 1960.

Q. Before going there, did you have a meeting with Mr. McManus and Mr. Greenberg?

A. Yes, sir.

Q. Did you discuss your impending visit to that store with them?

A. Yes, sir.

Q. And what did you say to them and what did they say to you with reference to it?

[fol. 2487] A. Both Mr. Greenberg and Mr. McManus said to buy from Woodward & Lothrop household items that were packaged in plastic, glass and metal, and they have a special section in the store for household items.

Q. And was that the sum total of your conversation with them on that first occasion?

A. Yes, sir.

Q. And, having had that conversation, you went to that store for the first time when?

A. On September the 1st.

Q. Wasn't it August 31st?

A. August 31st. On August 31st, yes, sir.

Q. And following that visit to the store, you had a further conference with Mr. McManus and Mr. Greenberg?

A. Yes, sir.

Q. And when was that?

A. When I returned to Mr. McManus' office with the purchases, I recall mentioning that there were other items in the household department that I noted, and should I purchase those.

Q. And what items did you note to them?

A. I noticed, for instance, Clean-Tint fabric color, and a metal can of Fabspray, which I thought was used for the [fol. 2488] same purpose.

Q. And what did they say to that?

A. "If you think it's the same product, purchase it."

Q. And is that the sum total of your conversation with them—

A. Yes, sir.

Q. —on that day?

A. Yes, sir.

Q. And when was that conversation?

A. That would be August 31st.

Q. You went back on September 1st?

A. Yes, sir.

Q. You made that single purchase?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And following that, did you return again and have a conversation with Mr. McManus and Mr. Greenberg?

A. I don't recall, sir.

Q. Did you go to the store again?

A. Yes, sir, I did.

Q. On what date?

A. I went to the store again on September the 6th.

[fol. 2489] Q. Was that on your own responsibility, or following conversations with them?

A. Following conversations with Mr. McManus and Mr. Greenberg.

Q. And when did you converse with them prior to your visit to the store on September 6th?

A. I recall it was on the morning of September the 6th.

Q. And you and they had a conversation?

A. Yes, sir.

Q. Will you tell us the substance of what they said and what you said?

A. I recall Mr. McManus saying to purchase some items from Woodward & Lothrop like bath lotion and hand lotion and bath oil, cologne, if it was packaged in plastic and glass.

Q. In other words, he suggested that you purchase these items?

A. Yes.

Q. And following that, you went and purchased the items—

A. Yes, sir.

Q. —that are indicated on page 15?

[fol. 2490] A. Yes, sir.

Q. As I have numbered these pages?

A. Yes, sir.

Q. And then you went there another time; is that correct?

A. Yes, sir.

Q. And that was when?

A. The following day.

Q. And you made two purchases; is that correct?

A. Yes, sir.

Q. As shown on page 16?

A. Yes, sir.

Q. And was that at the suggestion of either Mr. McManus or Mr. Greenberg?

A. I recall that on September 6th I ran out of money, and I said, "I saw an item that appeared to be a mighty good item in Breck shampoo that was packaged in glass

and packaged in plastic," but I would need more money to purchase that item.

Q. And what did Mr. McManus say to that?

A. He gave me the money and I purchased the item.

Q. Did he tell you to purchase it?

A. Yes, sir.

[fol. 2491] Q. And was that the only item that you referred to in the conversation with him preceding your visit to the store on September 7th?

A. Yes, sir.

Q. And if we were to add up the amounts which you have indicated in this Exhibit 949 in evidence as the amounts that you paid for the various articles, we would get the total of the amount that you spent?

A. Yes, sir. Yes, sir.

[fol. 2492] Q. Now, would you refer, please, to those pages of Exhibit 949 that relate to your first visit to the Giant supermarket. Would that be page 3 and page 4?

A. Yes, sir.

Q. Was it on the day of your first visit to that supermarket that you bought the boysenberries?

A. Yes, sir.

Q. Again referring to Exhibit 949, you refer from time to time to identifying a receipt, turning it over to Mr. McManus; do you see that?

A. Yes, sir.

Q. To what were you referring when you used that term "this receipt"?

A. When the clerk at the cash register of the Giant supermarket itemized the products, I asked her for the receipt and then I returned it to Mr. McManus, and identified it as the receipt of the purchases made by me at the Giant store on that particular date.

Q. And when you refer to that receipt running through this exhibit, you got a receipt in each instance from each store?

A. Yes, sir.

Q. And in each instance you turned it over to Mr. McManus.

A. Yes, sir.

The Court: Is there any thing farther with this witness, Mr. Hughes?

Mr. Hughes: Your Honor, I am just going through my notes.

Q. Did you ever come back to Mr. McManus or Mr. Greenberg with instructions with reference to purchasing Aerosol cans?

A. I mentioned that I saw chocolate syrup in a pressure can. "Would you want something like that?" And both agreed, "Yes, if you saw chocolate syrup in an Aerosol can, purchase it."

Q. Is that the only reference to Aerosol cans there was in the conversations between you and them?

A. Well, I assumed that meant all products that I saw in Aerosol cans.

Q. In other words, you interpreted what they said to you to be on the lookout for Aerosol cans?

A. Aerosol cans.

Q. In all categories that you were looking for; is that right?

A. Yes, sir.

Mr. Hughes: I think that is all.

[fols. 2494-2534] The Court: Anything further?

Mr. Greenberg: The Government has no further questions, your Honor.

The Court: All right, you may step down, Mr. Danbom.

(Witness excused.)

[fols. 2535-2553] OFFERS IN EVIDENCE

(Court's Exhibits 3 through 12 were marked for identification.)

(The following Government's Exhibits, previously marked for identification, were received in evidence:)

Exhibits 952 through 975.

978 through 1005.

1008 through 1019.

1024 through 1032.

1035 through 1058.

1060 through 1062.

1064 through 1076.

1079 through 1081.
1083 through 1085.
1087 through 1091.
1093.
1095 through 1102.
1105 through 1149.
1153 through 1155.

[fol. 2554] WILLIAM B. SLOAN, called as a witness by the government, being first duly sworn, testified as follows:

•Direct examination.

By Mr. McManus:

Q. Mr. Sloan, you are an agent of the Federal Bureau [fol. 2555] of Investigation? 4-7

A. Yes, sir, I am.

Q. And from what office?

Q. I am assigned to the Atlanta, Georgia office.

Q. And in the course of your duties, were you directed by the Antitrust Division of the Department of Justice to make an investigation in certain stores in Atlanta, Georgia to determine products which would be packed in cans and glass, cans, glass and plastics, or glass and plastic?

A. Yes, sir.

Q. And in the course of your duties you reported back to the Antitrust Division the results of your survey?

A. Yes, sir, I did.

Q. And do you have copies with you of what you observed in those stores?

A. Yes, sir.

Mr. McManus: Your Honor, I believe the first one is Court Exhibit 5, which we would like marked as Government's Exhibit 11.

The Court: Presently it is Court's Exhibit 5 for identification?

Mr. McManus: Yes, your Honor. We would like to mark [fol. 2556] that Government's Exhibit 11 for identification.

The Court: For identification?

Mr. McManus: For identification.

The Court: Very well.

(Court's Exhibit 5 for identification marked Government's Exhibit G-1158 for identification.)

Mr. McManus: Excuse me, your Honor, I seem to have made an error.

The Court: You were referring to Court's Exhibit 7?

Mr. McManus: Yes, sir. May we correct that so that Court's Exhibit 7 should be Government's Exhibit 1158 for identification?

The Court: All right. Court's Exhibit 7 will be handed to the clerk so that it may be marked.

By Mr. McManus:

Q. Mr. Sloan, I show you Government's Exhibit 1158 and could you tell me what this purports to show?

A. This is a schedule of various products that I observed at the Colonial store, Candler Road and McAfee Road, Decatur, showing the various items that were contained in a can and glass. Also, some items that were contained in plastic and can.

[fol. 2557] **Mr. Hughes:** Would you say that again?

The Court: Plastic and can.

The Witness: Plastic—

Q. This report also shows the brand name, Mr. Sloan?

A. It shows the brand name and the size.

Q. And the check mark is to indicate where you observed that product in glass or plastic or can?

A. That's right, sir.

Mr. McManus: Your Honor, the government offers G-1158.

The Court: I take it you wish to examine the witness on it?

Mr. Hughes: Yes, I do, your Honor.

By Mr. Hughes:

Q. Mr. Sloan, how long have you been with the FBI?

A. I have been a special agent nine and a half years.

Q. Have you ever been connected with the can manufacturing business in any way?

A. No, sir.

Q. Or the glass manufacturing business?

A. No, sir.

[fol. 2558] Q. Or the plastic container manufacturing business?

A. No, sir.

Q. Or the food packing business?

A. No, sir.

Q. Or have you been connected with any concern which manufactures toiletries or cosmetics?

A. No, sir.

Q. Or drugs?

A. No, sir.

Q. Medicines?

A. No, sir.

Q. Household items?

A. No, sir.

Q. And—

The Court: Have you ever been in any business connected in any way with any of the items that appear on Exhibit 1158?

The Witness: No, sir.

The Court: All right.

By Mr. Hughes:

Q. And are you chemist?

A. No, sir.

Q. This exhibit, Exhibit 1158, which you identified, re-[fol. 2559] lates to a visit that you made to the Colonial store in Atlanta; is that correct?

A. Yes, sir.

Q. Is that store in your neighborhood? Do you live in the neighborhood?

The Court: Let me ask you for one thing, for my information. Is Decatur a suburb of Atlanta?

The Witness: It is part of the metropolitan area.

By Mr. Hughes:

Q. Is your home near there?

A. This particular store, I would say, is three miles from my home.

Q. Are you familiar with that neighborhood?

A. Fairly; fairly familiar.

Q. Do you know whether there are any restaurants or taverns in that neighborhood?

A. The closest restaurant would be a mile away, and that is a dry county. There wouldn't be——

Q. That is a dry county?

A. Yes, sir.

Q. Are there any diners or anything of that sort?

The Court: All Atlanta is dry, isn't it?

[fol. 2560] The Witness: Yes, sir.

A. The only thing, eating place, would be a five-and-dime store and a drug store. They are nearby.

Q. Are there any schools and hospitals nearby?

A. There is a school about a half a mile. No hospitals.

Q. Now, when you undertook this assignment to go to the Colonial store, did you understand that one of the things that you were to look for was containers made of plastic?

A. Yes, sir.

Q. And what did that term mean to you?

A. Well, just a container made of plastic.

Q. Is that the best you can conjure up when you are asked to define what that term embraces?

A. Yes, sir.

Q. Well, would it include in your mind such a thing as a plastic tube?

A. I think in one instance it was a plastic tube.

Q. Well, whether you think or not, would you consider that that was embraced within the term?

A. Yes, sir, I believe so.

[fol. 2561] Q. Would you consider that flexible packaging was embraced within that term, things like plastic film?

Mr. McManus: Your Honor, my only objection is, would Mr. Hughes define what he means by "flexible packaging"?

The Court: Well, he is about to do that.

Mr. McManus: Mr. Hughes?

The Court: Mr. Hughes, yes.

By Mr. Hughes:

Q. Do you understand the term "flexible packaging"?

A. Not thoroughly.

Q. Does it mean anything to you?

A. Flexible—I would say it is something like cellophane, the same basic—

Q. And would that be embraced within your understanding of containers made of plastic?

A. No, sir.

Q. And were you also to look for containers made of tin? Was that part of your assignment?

A. Yes, sir; metal, tin.

Q. And what did that embrace in your mind?

A. Tin cans.

[fol. 2562] Q. Anything else?

A. No, sir.

Q. Would it embrace tubes made of tin?

A. No, sir.

Q. Things like toothpaste tubes?

A. No, sir.

Q. In other words, you would consider that a plastic tube was within the definition of a container made of plastic, but you wouldn't consider that a metal tube made of tin was within the definition of a container made of tin; is that a fair statement of it?

A. I believe so.

Q. Now, did you make only one visit to this store, this Colonial store? Did you make only one visit to that store?

A. There were two visits. I started on August 29th, and I had to end the day. I naturally stopped work and came back the next day. Two days of work.

Q. Were they consecutive days?

A. Yes.

Q. How long were you there on the assignment altogether, would you say?

A. I would roughly say approximately eight hours.

[fol. 2563] Q. I notice that on this Government's Exhibit 1158 for identification you do not indicate any prices of any of the products that you observed; is that correct?

A. No prices.

Q. Did you in fact note the prices?

A. I didn't note—I didn't pay—

Q. You didn't pay any attention to that, did you?

A. I didn't pay any attention, no sir.

Q. Did you make any observation of the quality of any of the products in any of the containers that you observed?

A. No, sir.

Q. Did you pay any attention to differences in preparation of the product?

A. No, sir.

Q. Could you tell whether the products which you observed were specially packed for special purposes, such as, for example, diatetic purposes?

A. No, sir.

Q. Do you know whether any of the products which you observed were processed by heat sterilization?

A. No, sir.

[fol. 2564] Q. Did you make any observation as to the amount of shelf space devoted to the different types of containers for what you determined to be similar products?

A. No, sir.

Q. Now, do you have any information as to the quantities of any product which you observed in the inventory of that store on that day

A. Would you repeat that, sir?

Q. I say, do you have any idea of how much that store had in inventory of any of the products that you observed and put on this list, Government's Exhibit 1158?

A. No, sir.

Q. And I don't suppose you have any idea as to the quantities of any of these items which were sold by that store that day or any other day?

A. No, sir.

Q. Or by any other store in the Atlanta area?

A. No, sir.

Q. Or in the United States?

A. No, sir.

Q. And you don't have any information, do you, with respect to the formulation of any of the products which you [fol. 2565] observed packaged in either cans or glass or plastic?

A. No, sir.

Q. Do you know what a light-duty detergent is?

A. Do I know what a light-duty detergent is?

Q. Yes, sir.

A. No, I don't.

Q. Did you take any note as to whether any of the products which you purchased were packaged locally or at a distance?

A. No, sir. I did not purchase any products.

Mr. Hughes: I withdraw that.

Q. Did you make any observations as to whether any of the products which you observed were packed locally or at a distance?

A. No, sir.

Q. And could you tell from the package of the article, or any of the articles that you observed, whether or not they were being test marketed?

A. No, sir.

Q. Did you know whether any of them were on sale, that is, on special?

A. No, sir.

Q. Could you tell whether any of the articles you observed [fol. 2566] served were from obsolete stock?

A. No, sir.

Q. And could you tell whether any of them were packed experimentally?

A. No, sir.

Q. And are you able to say whether any of the articles which you observed that day are still being packed by the packer?

A. No, sir.

Q. And you did not get into any direct contact with any of these packers either prior to or subsequent to your visit to that store, did you?

A. No, sir.

Q. And you don't know what reasons motivated them for packing their product in a particular container, do you?

A. No, sir.

Q. Or in a particular size?

A. No, sir.

Q. Did you observe whether in the Colonial store that day there were frozen food products on display?

A. No, I did—let me put it this way: They sell frozen products, but I didn't note them, pay any attention to them.

[fol. 2567] Q. In other words, you did not pay any attention to them?

A. No, sir.

Q. So you couldn't tell us—

The Court: They had a department in which they sold frozen food products?

The Witness: Yes, sir.

By Mr. Hughes:

Q. And did they sell dried foods; dehydrated foods; did you notice that?

A. I did not notice that.

Q. Would you know what items were dehydrated food items, actually?

A. Well, I would say prunes, dehydrated prunes.

Q. That occurs to you as such an item?

A. Yes, sir.

The Court: Are we agreed that that is dehydrated, the ordinary prune that you might use?

Mr. Hughes: I don't know.

The Court: All right. Mr. Sloan, I don't think you are expected to know either.

Q. Did you happen to observe whether any of the products were imported?

A. No, sir.

[fol. 2568] Q. That is, you made no observations along that line at all?

A. No, sir.

Q. And going back to the other products sold in the store, did you observe whether they sold fresh fruits and vegetables, fresh foods?

A. Yes, sir. They have that department.

Q. Fresh meats?

A. Yes, sir.

Q. And fresh dairy products?

A. Yes, sir.

Q. Milk, butter and things of that sort?

A. Yes, sir.

Q. But you made no particular note of what articles of that kind they were selling, is that right, beyond the fact that they were selling articles of that general nature and description?

A. That's correct.

Q. Now, you don't have any information, do you, as to the method of processing of the various products that you observed?

A. No, sir.

Q. And you don't have any information as to the method of filling the containers?

[fol. 2569] A. No, sir.

Q. Do you happen to know the difference between high-density and low-density polyethylene?

A. No, sir.

Q. There has been marked for identification in this case as Court's Exhibit 3 a communication from Mr. Bicks to the Director of the Federal Bureau of Investigation.

Mr. McManus: Your Honor, at this time, if we could, if the defendants have no objection; could we give this a government number? There is no problem about it.

The Court: Oh, I think so. As you refer to these things, I think you better translate them from court exhibit numbers to government exhibit numbers.

Mr. Hughes: That would be——

The Clerk: 1159.

The Court: Mr. Clerk, I will give you these exhibits as we go along so you can mark them.

(Court's Exhibit 3 for identification marked Government's Exhibit 1159 for identification.)

By Mr. Hughes:

Q. I will start all over again, Mr. Sloan, and show you Government's Exhibit 1159 for identification and ask you [fol. 2570] whether you ever saw that or a copy of that before.

A. Yes, I saw a copy of this.

Q. And were they the instructions to you as to what you were to do?

A. Yes.

Q. And they served as your guide in carrying out your assignment?

A. Yes.

Q. I call your attention to the last paragraph of that exhibit.

A. Yes, sir.

Q. Do you recall whether at any time during the execution of your assignment you had occasion to get in touch with either Mr. McManus or Mr. Greenberg?

A. I did not.

Q. Mr. Sloan, I call your attention to Government's Exhibit 1158 for identification. Do you have that there?

A. Yes, sir.

Q. Will you turn to the last page, to the item "Hair shampoo." Do you see that?

A. Yes, sir.

The Court: Is that page 9?

[fol. 2571] Mr. Hughes: Yes, page 9.

Q. You have a check mark opposite a Prell three-ounce item under the column "Plastic." Is that the article that was in the plastic tube to which you referred earlier in your cross examination?

A. Yes, sir.

Q. And just—

The Court: What do you mean by that? Let me understand precisely what you mean by a plastic tube. Is that a toothpaste tube, the shape of the—

Mr. Hughes: Your Honor, I think we can be helpful. We don't want to add to the drug store, but we do have—

The Court: Well, I think it is very important, Mr. Hughes, that we do not monopolize all the products in this country in the courtroom.

By Mr. Hughes:

Q. Is this plastic tube that I show you the article that you observed, as far as you can tell?

A. It's the same type. I don't know about the size.

The Court: Let me see that.

Q. If this were a three-ounce size, would you say it was the same thing?

[fol. 2572] A. Yes, sir.

Q. In any event, it was that tube?

A. Correct.

The Court: What is this? How does this work, Mr. Hughes? Is it sort of a squeeze—

Mr. Hughes: Yes, sir. I warn you not to take the top off. If you take the top off, it operates more or less as a tooth-paste—

The Court: Is this viscous in form?

Mr. Hughes: Yes, it flows.

The Court: Not a liquid, but a heavy liquid.

Mr. Hughes: I don't purport to be an expert, but, as I understand it, with plastic it doesn't collapse the way the metal tube does.

The Court: I see.

Mr. Hughes: But you press and the contents are dispensed.

Perhaps I should assure your Honor that we have not many articles like that included in the record.

The Court: What do you propose to do with that now?

Mr. Hughes: Your Honor, perhaps I thought to mark it as our exhibit for identification. That would be—

[fol. 2573] The Court: And if anything else goes in, yours will go in with it.

Mr. Hughes: Yes. And we will continue the lettering.

The Court: Yes. Up to the close of the government's case in chief, we will continue the lettering of the defendants' exhibits.

(Defendants' Exhibit R marked for identification.)

[fol. 2574] Q. Now, returning to the last page of Government's Exhibit 1158 for identification, do you notice the item "deoderant"?

A. Yes.

Q. And there are two items there, one, two fluid ounces, which you indicate was a plastic container; is that right?

The Court: 12 fluid ounces, I think that is.

A. Pardon me. That is a 1.2.

Q. 1.2 fluid ounces.

A. Yes.

The Court: Oh.

Q. Do you know whether that was a squeeze-type bottle, plastic bottle?

A. I am pretty sure it was, yes.

Q. And do you remember what if anything there was on it? Do you remember whether the name on it was Mum Mist?

A. I don't recall that.

Q. You wouldn't dispute that, would you?

A. Could be. I don't know.

Q. And the other item is 7 ounces. Was that in a glass jar?

A. 7 ounces.

[fol. 2575] The Court: 7 ounces.

Mr. Hughes: Excuse me.

Q. 7 ounces?

A. Yes.

Q. That was in a glass jar?

A. Yes.

Q. And that was a cream; is that right?

A. I believe it was.

Q. Do you know what color it was? Do you know what color the contents were, the color of the bottle, of the jar?

A. I can't remember that, sir.

Q. Do you remember the color of the plastic container?

A. No, sir.

Mr. Hughes: Now just one other item, your Honor.

Q. On page 8, do you see the item "toilet bowl cleaner"?

A. I do.

Q. And under that do you have a trade name "Sani-flush"?

A. Yes, sir.

Q. And you have that listed, one of those items, as an [fol. 2576] Aerosol; do you see that?

A. Yes, sir; I see that.

Q. Well, will you describe that item for me, that you say you saw in an Aerosol container?

A. I can't recall at this time.

Q. Well, would it surprise you if I were to tell you that that article doesn't come in an Aerosol container?

Mr. McManus: I object, your Honor.

The Court: I will allow the question.

Mr. McManus: It is really not a question; it is a statement of fact by Mr. Hughes. That is the reason I am objecting.

The Court: We are not taking any statements of fact by Mr. Hughes. I will permit the question.

Mr. Hughes: I thought it was a question.

The Court: All right.

Q. Would you like the question again, Mr. Sloan?

A. Yes, sir.

(Question read.)

A. I don't know why the check mark is here. It could have just the can. It might be my error.

Q. You could have made a mistake, couldn't you?

A. Yes, sir. There are four columns there.

[fol. 2577] The Court: What page is that on?

Mr. Hughes: Page 8, your Honor.

The Court: Page 8. Oh, yes, I see.

Q. Did you notice whether the Saniflush in the can was in powder form?

A. I did not open the can.

Q. And do you or do you not say that you saw any Saniflush in a glass container?

A. I did not—

The Court: Wait a minute.

A. Wait a second. I did see it. I got my columns mixed up, that is all.

Q. Do you know which if any of these various household products were powders or liquid, in this list of products that appear on Exhibit 1158 for identification?

A. No, sir.

Q. I mean, you couldn't give us that detail now, could you?

A. No, sir.

Q. And would you have any independent recollection of the items that you saw without the benefit of that sheet before you to refresh your recollection?

A. No, sir; not at this time.

[fol. 2578] Q. You have lots of assignments in your work, don't you?

A. Yes, sir.

Mr. Hughes: Well, your Honor, I object to it, on the ground that it is both irrelevant and immaterial, and that no proper foundation for the reception of the document into evidence has been made.

The Court: The objection is overruled. 1158 for identification and Defendants' Exhibit R will both be received.

Mr. McManus: Your Honor, if the defendants have no objection, I think it might help also if 1159 is received in evidence.

Mr. Hughes: Which is 1159?

The Court: Those are the instructions to the agent.

Mr. Hughes: I have no objection to that.

The Court: All right, 1158, 1159 and the green tube will be received.

Mr. Hughes: Well, perhaps I should explain my position. 1158 having been admitted over my objection, I don't object to the admission of 1159.

The Court: I see.

(Government's Exhibits 1158, 1159 and Defendants' Exhibit R received in evidence.)

Direct examination continued.

By Mr. McManus:

Q. Mr. Sloan, did you make a visit to another store subsequent to the visit you just discussed?

A. Yes, sir.

Q. And what store is that, Mr. Sloan?

A. That is the Big Apple Supermarket, at 302—pardon me—3203 Greenwood Road Southeast, Atlanta.

Q. And do you have a copy of the list of the products that you observed at that store?

A. Yes.

Mr. Hughes: Mr. McManus, it would help me in following if you could tell me what Court exhibit number that is?

Mr. McManus: This is not a Court exhibit number. I am going to give you a copy. Will that help you?

Mr. Hughes: Well, it would help us to relate to—all right.

Mr. McManus: If I could have it marked, your Honor, than I will give defendants a copy.

The Court: All right, we will have it marked for identification with a Government's exhibit number.

(Marked Government's Exhibit 1160 for identification.)

[fol. 2580] Mr. Hughes: Could you give us some time so that we could follow this?

Mr. McManus: Yes, I will.

The Court: Does 1160 for identification relate to any of the documents, by way of report, that were given to the defendants last night?

Mr. McManus: Yes, your Honor. It is taken from that report.

The Court: Which one?

Mr. Hughes: Which one?

Mr. McManus: It is the 9760 report.

Mr. Hughes: Constituting part of what?

The Court: It would be part of 5, wouldn't it?

Mr. Hughes: It might be part of 6. That is the difficulty, your Honor. These are all mixed up.

The Court: No, the 9-page schedule. Do you have 6?

Mr. Hughes: 6.

The Court: There are only two reports by Mr. Sloan. One is the 9-page schedule and the other was Exhibit 5.

Mr. Kuhn: This is part of 10.

Mr. Hughes: This is part of Exhibit 10 for identification.

[fol. 2581] The Court: Oh, is it?

Mr. Hughes: Yes.

The Court: All right. You have got it now, in any event, have you?

Mr. Hughes: Now, is there a pending question? I am straightened out. Is there a pending question?

Mr. McManus: I am just about ready to ask one.

The Court: Go ahead.

By Mr. McManus:

Q. Mr. Sloan, you have a copy of Government's Exhibit G-1160 for identification?

A. Yes, sir.

Q. And that exhibit purports to show the products packaged in glass, can and plastic containers, observed by you on the shelves of the Big Apple Supermarket in Atlanta?

A. Yes, sir.

Q. And in the left-hand column is the name of the product?

A. Yes.

Q. And in the middle column is the number of types of brands that that product was packed in, in glass; is that [fol. 2582] correct?

A. Yes, sir.

Q. And the number in cans is in the right-hand column?

A. Yes.

Q. Now, could you tell me just one thing, Mr. Sloan? In relation to the stores in the Atlanta area, do you know is this supermarket a large, medium size or small store?

A. It is not the largest. I'd say it is medium-sized.

Mr. McManus: I see.

Your Honor, the Government offers G-1160.

The Court: First of all, Mr. Sloan, let me ask you this question: You recall the questions that Mr. Hughes asked you with respect to the last exhibit, do you?

The Witness: Yes, sir.

The Court: Would your answers to those questions be the same with respect to this exhibit as they were with respect to the last exhibit?

The Witness: Yes, sir.

The Court: All right. Now you can go ahead from there, Mr. Hughes.

[fol. 2583] Mr. Hughes: Yes.

By Mr. Hughes:

Q. Mr. Sloan, if you did not have that Exhibit G-1160 for identification before you would you have any independent recollection of the products that you observed in the Big Apple Supermarket on September the 1st, 1960?

A. No, sir.

Q. So that without that exhibit in front of you, you could not state to his Honor what you had seen and observed there that day, by way of products; is that correct?

A. Yes.

Q. Was this the second store you went to, do you remember?

A. Yes, sir.

Q. And how long were you in this store?

A. It would be my guess or estimation, approximately four hours.

Q. And did anyone assist you in making your observations?

A. No, sir.

Q. And did you prepare a list of what you observed?

[fol. 2584] A. Yes, sir.

Q. Did you do that yourself?

A. Yes, sir.

Q. Now will you turn to Exhibit G-1160; do you notice that first item there, "olives"?

A. Yes.

Q. Do you know what kind of olives they were?

A. I do not recall.

Q. You just can't give us any help on the subject at all, can you?

A. No, sir.

The Court: For example, Mr. Sloan, you don't know whether these olives were stuffed olives or green olives or the dark ripe ones?

The Witness: No, sir.

The Court: Just olives?

The Witness: Olives.

Q. And turning over to the next page, do you see the item "coffee," the third last item under "food products"?

A. Yes, I see.

Q. Do you recall what kind of coffee that was that you saw?

A. Well, I would tell you by brand name some of them, [fol. 2585] that is all, maybe two or three.

Q. Well, I will come back to that in a minute. But did you note whether any of this was ground coffee or soluble cof-

fee, or did you make any such distinction as that in your mind?

A. No, sir.

Q. Well, now, going back to these headings, you say "number in glass," then you say "number in cans," and then under "olives" you have "five." Does that mean—well, what does that mean when you say "olives five"?

A. That is the type of olive, type of olive.

Q. Are you talking about the brand now?

A. No, sir. That is different type of olives that it had on the shelf.

Q. In other words, this means that you saw five, what at least to you seemed to be five different types of olives?

A. Yes.

Q. In glass?

A. Yes, sir.

Q. And that is wholly without regard to brand; is that correct?

A. That is correct, sir

[fol. 2586] Q. And you saw three types of olives in cans; is that correct?

A. Yes, sir. That is what it says here. That is how I would know:

Q. How did you come to the determination that there were three different types of olives in the cans?

A. Different name on the outside, as his Honor just said, green olives, ripe olives and whatnot.

The Court: If some olives were stuffed with onions, some were stuffed with pimento, for instance, would that make a difference?

The Witness: I don't know about—it would be stuffed olives. I didn't go—distinguish from stuffed.

The Court: Now let me ask you this: altogether, I gather from this list there must have been eight different kinds of olives on those shelves; is that right?

The Witness: Yes, sir.

By Mr. Hughes:

Q. And that is wholly without reference to brand; is that right?

A. Yes, sir.

The Court: Well, now, could you by any chance tell us [fol. 2587] what the eight different kinds of olives were, without trying to differentiate at the moment between glass and cans?

The Witness: No, sir.

Q. Well, now, go back to this item of coffee; you see under the number in glass you have eight; do you see that?

A. Yes.

Q. Does that mean that you observed eight different types of coffee?

A. In the case of coffee, I went by brand on that.

Q. So that on some of these categories you went by brand and on some of them you went by the kind of product; is that correct?

A. I believe coffee was the only item I went by brand.

Q. By brand?

A. Yes.

Q. Now, take baby food; was that brand or was that separate items under that number 22?

A. No, sir, I believe that is separate items.

Q. Well, do you actually have any independent recollection of that?

A. No, sir.

[fol. 2588] Q. I mean, you are not telling his Honor that you saw 22 different, separate items of baby food wholly without relation to brand, are you?

A. 22 different baby foods. No, brand was not considered there.

The Court: In other words, you start off with prunes and strained kind of things, all the various kinds of vegetables and fruits, and so forth, and that would comprise your 22, or, as I gather it here, 29 different kinds of baby foods; is that right?

The Witness: Yes, sir.

Q. Take the item of peaches; do you see you have under glass four?

A. Yes, I see that.

Q. What does the numeral 4 there mean, that you saw four different kinds?

A. Four different kinds of peaches. As I recall—I can

recall one, spiced peaches. Then another one was pickled peaches, and I can't recall the other two, sir.

The Court: And another one was ordinary canned peaches?

The Court: And another one was ordinary canned peaches?

The Witness: I suppose so. I can't recall.

Mr. Hughes: I was referring to the ones in glass, as it [fol. 2589] happened, your Honor.

The Court: All right.

Q. Were some of them sliced, some of them not sliced, is it possible?

A. It is possible.

Q. But you don't remember?

A. No, sir.

Mr. Hughes: He said spiced.

Q. I said, some of them might have been sliced and some of them might not have been sliced; you just don't know?

A. No, sir.

Q. Now, is the soft drink analysis here, or tabulation, with 23 soft drinks in glass and 12 in cans, was that also without regard to brand?

The Witness: That was brand. Brand was in there, such as Pepsi Cola and Coca Cola.

The Court: In other words, Pepsi Cola and Coca Cola you would count as two? And 7-Up, you would count as one?

The Witness: Yes, sir.

The Court: And Hires Root Beer, you would count as another one, and so forth and so on?

The Witness: Yes.

[fol. 2590] The Court: Then you would go on to all the shades and flavor?

The Witness: Yes.

The Court: Cream soda and sarsaparilla, and all that stuff?

The Witness: Yes.

By Mr. Hughes:

Q. So there was just the element of brand and the element of kind of flavor within the brand; is that right?

A. Yes, sir; in that instance.

Q. You can't tell us exactly how you arrived at that ultimate figure of 23; is that right?

A. I just stood there and took awhile to count the number of brands they had, and I just wrote 23 on my notes.

Q. You can't tell me now how many brands there were, can you? There were 23 brands?

A. 23 brands.

The Court: No, he didn't say that.

A. (Continuing) Or flavors.

Mr. Hughes: I thought he didn't say that.

The Court: He didn't say that.

Q. How many brands were there?

A. I cannot say exactly the brands.

[fol. 2591] The Court: Let me ask you this, Mr. Witness, could you tell us from this tabulation whether, for instance, in this store in South Atlanta, Coca-Cola appeared both in glass, in glass bottles, and in a can?

The Witness: You use Coca-Cola. Coca-Cola doesn't come in cans.

The Court: You just know that—

The Witness: Yes.

The Court: Can you tell us from this tabulation any soft drink of the same brand that comes both in a can and in a bottle, that was in that store at that time?

The Witness: The only one I can be definite about would be Pepsi-Cola, I believe. Pepsi-Cola.

The Court: They had bottled Pepsi-Cola and in cans?

The Witness: Yes, sir.

By Mr. Hughes:

Q. Did you observe the sizes of the bottles and the cans?

A. No, sir.

Q. You couldn't tell us whether they were comparable [fol. 2592] or not?

A. No, sir.

Q. And made no comparison of the price of the Pepsi-Cola in the bottle or in the can?

A. No, sir.

Q. Now, would you go to the last item on the first page, asparagus. You see that you have six cans. Is that six different kinds of canned asparagus?

A. Yes.

Q. Or is that brands?

A. Six kinds.

Q. And will you name those six kinds for us?

A. I would be unable to name all of them. I might name two.

Q. Well, name two of the six.

A. It would be asparagus tips, asparagus spears.

Q. In cans?

A. In cans. That's the only ones I can recall.

The Court: Mr. Hughes, we will take a brief recess.

(Short recess.)

[fol. 2593] The Court: Go ahead, Mr. Hughes.

Before you proceed I want to ask the witness one question here.

By the Court:

Q. In the first exhibit that you referred to, which is G-1158, Mr. Witness, you went into considerable detail with respect to brand names, sizes and types of products, and I note that in the second exhibit, which we now have under consideration, 1160, you eliminate a large part of the detail that you had in your first exhibit.

A. That's right.

Q. Can you tell me how that came about? Why did you adopt one method of tabulation in the first store you went to and a different method of tabulation in the second store?

A. It was taking considerable time, and so, arriving back in the office, I just re-evaluated and reexamined the department's memo and came up with doing it in the brief manner.

Q. I take it you have a fair case load in the Atlantic field office, have you?

A. Yes, sir. I have to fit it in with my other work.

[fol. 2594] • By Mr. Hughes:

Q. You understood it to be a hurry-up job?

Mr. McManus: I object, your Honor. I am not sure what a hurry-up job is.

The Court: Well, if the witness can answer the question.

Mr. McManus: Maybe Mr. Hughes can tell us.

Q. Can you answer that question?

A. Well, it took me—we had about 15 days to do it.

Q. Did you understand that you were to complete this assignment as rapidly as you possibly could?

A. Not as rapidly; just to get the report in by the date shown in the memo.

Q. And how much time did that give you?

A. I think—let's see—

The Court: Well, does the memo state it?

Mr. Hughes: I believe it does, your Honor.

The Court: "If it is feasible, we would like the investigation completed and the reports forwarded to us on or before September 19."

Is that the way you understood it?

The Witness: Yes, sir.

[fol. 2595] The Court: I was reading from G-1159.

By Mr. Hughes:

Q. And did you meet that deadline?

A. Yes, sir.

Mr. Hughes: Your Honor, I object to Exhibit G-1160 for identification on the ground that it is incompetent as well as irrelevant and immaterial. My grounds for stating that it is irrelevant and immaterial are the same grounds that I have previously urged with reference to prior documents.

In addition to that, your Honor, it seems clear to me that the witness has no independent recollection of what he saw and did, and the paper itself, which is really tendered as the evidence, is incompetent. You can't cross examine a piece of paper.

And so I feel that, in addition to both relevance and materiality in this instance, I should add the objection as to competence.

The Court: I will hear you, Mr. McManus.

Mr. McManus: Your Honor, what we are trying to prove by this witness is not that he is an expert in packaging, not that he is an expert in the food or drug field, all we are trying to prove, you Honor, is that if a man is going into a store to buy baby food, for example, or apple juice, [fol. 2596] or applesauce, he could find those products in metal cans and glass containers.

Now, we don't hold out Mr. Sloan to be any type of an expert in any of these products. He is just like an ordinary shopper that is going into the grocery store to buy a can of applesauce, and he has got a choice of applesauce in cans and he has got a choice of applesauce in glass, and it is our contention that the glass people and the can people are trying to influence Mr. Sloan to buy these products in there and they are making them available in the retail outlets.

I think it is interesting that Mr. Sloan does not know the types involved, one from the other. I think Mr. Sloan is an ordinary, every-day shopper. Probably most of the shopping he does is for his family, and the same is true of the other agents.

Before I got in this case I knew nothing particularly about applesauce, whether it came in cans or glass. If my wife sent me to the store to buy it, I would have bought one or the other, and I probably would have been influenced by the advertising.

Mr. Sloan is an ordinary shopper going into the store [fol. 2597] for what is available in these particular products, and I think this document is offered and should be accepted on that basis, your Honor.

The Court: Do you wish to be heard further, Mr. Hughes?

Mr. Hughes: Your Honor, it did not seem to me that anything Mr. McManus said addressed itself to the question of competence. My point would be that in substance the testimony of Mr. Sloan is that he really has no recollection, and the piece of paper really constitutes the testimony.

By the Court:

Q Well, when was this piece of paper made, Mr. Sloan? When did you make the report which included this material?

A. This material, the report, was made—I can tell by—I haven't got it with me, but it wasn't long after that. I came back to the office and dictated it—

Q. Did you have notes?

A. Yes, sir. I made notes, a schedule.

Q. And you made notes while you were in the store?

A. Yes, sir.

[fol. 2598] Q. You plainly did not carry all these items in your head.

A. No, sir.

Q. And then you came back to the office, and then you prepared this from your notes?

A. Not at that time. I prepared my report that went to the Department of Justice, and this was prepared for this purpose here today.

Q. Yes, I understand that. But this is in essence an excerpt of the items listed in your report?

A. Yes.

Q. And your report which you forwarded to the Anti-trust Division, or was forwarded to the Antitrust Division, was made up, in so far as the items are contained on these two sheets of paper, G-1160, from your notes, contemporaneously?

A. Yes, sir.

The Court: Well, I will tell you what I am going to do. I am frank to say, without at this point trying to ascribe the weight that I would give to 1158, for example, I will say the weight I give to 1160 would be very much less than the weight I would give to 1158. It seems to me, in the form in which it is prepared, to be of minimal significance, if any. However, I am going to admit it in evidence for whatever [fol. 2599] it may be worth.

Mr. Hughes: May I ask just one more question, in view of your Honor's ruling?

The Court: Yes.

By Mr. Hughes:

Q. I show you Court's Exhibit 10 for identification and ask you to look at the bottom of that second page of that exhibit and tell me, if you can, how much time elapsed be-

tween the time of your visit to that store and the time that you prepared your memorandum back at the office.

A: I visited the store on September 1, 1960, and I actually dictated this memorandum, as you call it, 9/6/60.

The Court: You dictated the memorandum from notes?

The Witness: Yes, sir.

The Court: All right.

Mr. McManus: Your Honor, Mr. Sloan, I believe, will testify that he visited three other stores, and he has copies from each one of those. If it would expedite matters at all, I will be glad to mark those three at this one time; and I think—

[fol. 2600] The Court: Mark them for identification.

Mr. McManus: That is what I mean, your Honor, and I think they are self-evident—

Mr. Hughes: Your Honor, may we have a few minutes? Because we get new numbers on these things and my notes overnight were prepared in a certain way—

The Court: Would you like me to give you five minutes or so to get those things in shape?

Mr. Hughes: If I get the numbers, Judge, I think I can go along.

The Court: All right.

(Government's Exhibit G-1160 for identification received in evidence.)

Mr. McManus: Will you mark this?

(Government's Exhibit G-1161 marked for identification.)

The Court: Can we tell Mr. Hughes—perhaps he already knows from which of these court exhibits these data are taken.

(Discussion off the record.)

(Government's Exhibits G-1162 and G-1163 marked for identification.)

The Court: Are there three of these or two?

[fol. 2601] Mr. McManus: There are three.

The Clerk: I am making the other one, your Honor.

The Court: All right.

Mr. Hughes: Your Honor, may the record show that Government's Exhibit G-1162 for identification constitutes part of Court's Exhibit 10 for identification?

The Court: All right.

Mr. Hughes: It apparently does. And G-1163 apparently is related to pages 4 and 5 of Court's Exhibit 10 for identification.

Your Honor, can we just have enough time to check these lists so we know that we are talking about the same thing?

The Court: Yes.

Mr. McManus: Your Honor, at lunch I will see how we can work this out.

The Court: Yes, try to give him copies of these other things and relate them to the court exhibits involved.

Mr. McManus: I will, your Honor.

I am sorry for this delay.

[fol. 2602] The Court: Now, gentlemen, with respect to these three exhibits, can we not handle these three exhibits by asking general questions? I don't want to restrict you, Mr. Hughes.

Mr. Hughes: No.

The Court: But for all practical purposes it seems to me they will turn out to be the same type of documents, prepared in the same manner. Perhaps we can save a good deal of time by treating them with the same general questions related to the questions previously asked.

Mr. Hughes: I think so, your Honor. Here and there I may want to ask some specific questions.

The Court: Of course.

By Mr. McManus:

Q. Mr. Sloan, Government's Exhibit G-1161, is that a survey that you made in Winn Dixie Food Market in Atlanta?

A. Yes, sir.

Q. And it was similar to the survey that you conducted in Government's Exhibit G-1160?

A. Yes, sir.

Q. And was Government's Exhibit 1162 a survey of the shelves of the A&P food store in Atlanta, similar to the [fol. 2603] survey that you made in Government's Exhibit G-1160?

A. Yes, sir.

Q. And was Government's Exhibit 1163 a survey of the shelves in the Kroger retail store in Atlanta, a survey similar to the one that you made in Government's Exhibit G-1160?

A. Yes, sir.

Mr. McManus: Your Honor, the government offers G-1161, 1162 and 1163.

By the Court:

Q. Now, Mr. Witness, take 1160 in your hand, please. Do you recall the questions that Mr. Hughes asked you and the Court asked you with reference to 1160? Do you?

A. Yes, I recall them.

Q. If the same questions were asked you with respect to 1161, 1162 and 1163, would your answers be the same?

A. Yes, sir.

Q. In substance?

A. Yes, sir.

The Court: All right.

Now, Mr. Hughes, have you anything further you want to [fol. 2604] question the witness on on these three exhibits?

Mr. Hughes: Excuse me, your Honor.

The Court: Yes.

By Mr. Hughes:

Q. Mr. Sloan, this Winn Dixie Food Store, is that within Atlanta? Is that within the city limits of Atlanta?

A. Not within the city limits. It's address—

Q. Is it in the suburban area?

A. Yes, sir.

Q. Do you live near this store?

A. It's about the same, about three miles away.

Q. Do you know anything more about this neighborhood than you told us about the neighborhood of the first store that you visited?

A. It is in the same general area.

Q. The same—

The Court: How far is the Winn Dixie Food Store from the Big Apple Supermarket?

The Witness: Approximately one mile.

Q. Now, one additional question that I don't think was put to you before, Mr. Sloan: You never worked for any concern that conducts surveys, have you?

[fol. 2605] A. No, sir.

Q. And you don't know anything about the techniques of conducting surveys, these consumer preference surveys and that sort of thing?

A. No, sir.

Q. You don't profess to be expert in that field?

A. No, sir.

Mr. Hughes: All right. The same objection, your Honor.

The Court: All right. The same objection, the same ruling, with the same caveat attached.

(Government's Exhibits G-1161 through G-1163 for identification received in evidence.)

Mr. Hughes: Your Honor, were your questions addressed to all three of those documents?

The Court: My questions to the witnesses were addressed to all three of those documents.

Mr. Hughes: May I have a minute? I was thinking of 1161.

The Court: Yes. My questions were directed to all three of them.

By Mr. Hughes:

Q. Mr. Sloan, going back to 1161, the fourth from the last [fol. 2606] item on page 3, you see, is baby bottles.

A. Yes, sir.

Q. Those baby bottles did not have anything in them; did they, when you observed them?

A. No, sir. They were empty.

The Court: Well, this baby bottle, did the baby bottle come in another glass container, or was the baby bottle the glass container by itself?

The Witness: It was just up on the counter by itself.

The Court: Just the baby bottle?

The Witness: Yes, sir.

The Court: Not wrapped in anything?

The Witness: No, sir.

By Mr. Hughes:

Q. And would your explanation of the numbers on these sheets be the same as your explanation on Exhibit 1160?

A. Yes, sir, based on this.

Q. Now, turning, Mr. Sloan, to Exhibit 1163, which relates to the Kroger store—

A. Yes, sir.

Q. Do you live near that store?

A. This store is about four miles from my home. It is in [fol. 2607] another direction from the others.

Q. And would you know anything about whether there were any restaurants or taverns or eating places near this store?

A. No, sir, except a five-and-ten-cent store; they have a little counter.

Q. I mean, do you really have any knowledge on this subject? Can you really tell us anything in detail about the neighborhood that this store is in?

A. This store is part of a shopping area of about 15 stores. At one end is Kroger's and at the other end is another grocery store.

Q. Are there any schools near it?

A. There's a high school about one-quarter of a mile.

Q. Any hospitals near it?

A. No, sir.

Q. Now—

The Court: What sort of area is that? What sort of population, if you know? What sort of population does that shopping center serve?

The Witness: It's a residential area.

The Court: Small houses?

The Witness: Small houses; medium class; medium [fol. 2608] income?

The Court: A medium-income group?

The Witness: Yes.

By Mr. Hughes:

Q. Now, I show you Exhibit 10 for identification, and specifically page 4 of that Exhibit 10, Court's Exhibit 10 for identification, and I call your attention to the last sentence of the opening paragraph. Do you see that, that sentence?

A. Yes, sir, I see it.

Q. Now, having seen that, I ask you whether the list which you prepared of what you observed in that store was prepared in any other or different manner than the list that you prepared for the other stores that you have told us about thus far in your examination.

A. It was prepared the same way, just going down the aisle with a card and writing numbers down.

Q. Did you prepare it yourself?

A. Yes, sir.

Mr. Hughes: I have no further questions, your Honor, on that exhibit, and the same objection as to that.

The Court: The same ruling. All three exhibits will be [fol. 2609] admitted under the same circumstances and under the same conditions as 1160.

Mr. Hughes: I am not sure the record shows an objection by me to 1163.

The Court: You have an objection to all those exhibits, 1161, 1162 and 1163, in substance the same objection.

Mr. McManus: Your Honor, that is all we have for Mr. Sloan. It is almost lunchtime. I am not suggesting we break, but if we did, I might be able to give Mr. Hughes that data—

The Court: It would be a good idea.

It is plain to me, gentlemen, that the essence of our getting anywhere here is to keep our paper work under good control, because if it once gets out of control, counsel is lost and the Court is lost.

Mr. McManus: That's right.

Mr. Hughes: May I ask one question before Mr. Sloan leaves?

The Court: Yes.

By Mr. Hughes:

Q. Mr. Sloan, have you testified now as to all the stores you visited?

A. Yes.

[fol. 2609a] The Court: All right.

(Witness excused.)

The Court: Gentlemen, we will take a recess until 2 o'clock, and I believe that will give you sufficient time to straighten out the paper work.

Mr. McManus: It will, your Honor.

The Court: Very good.

(Recess taken to 2:00 p.m.)

[fol. 2610]

AFTERNOON SESSION

2:15 P.M.

The Court: All right, Mr. McManus.

Mr. McManus: Mr. Craig, take the stand, please.

EDWARD J. CRAIG, called as a witness, having been duly sworn, testified as follows:

Direct examination.

By Mr. McManus:

Q. Mr. Craig, are you an agent of the Federal Bureau of Investigation?

A. Yes.

Q. And where are you located?

A. I am assigned to the Atlanta office, Atlanta, Georgia, office of the FBI.

Q. And were you in August of this year requested by the Antitrust Division of the Department of Justice to make an investigation for that Department?

A. Yes, I was.

Q. And did that investigation consist of your going to various stores in the Atlanta area to observe products

packed in cans and glass, the same product, or cans, glass and plastic, or glass and plastic?

A. That is correct.

[fol. 2611] Q. And you completed that investigation?

A. I have.

Q. And you forwarded copies of the investigation to the Antitrust Division?

A. That is correct.

Q. Mr. Craig, I would like to show you Government's Exhibit 1164 for identification—

Mr. Hughes: You are going to take these one at a time?

Mr. McManus: If you have no objection I would just as soon offer all of Mr. Craig's at one time, your Honor.

The Court: I think that would save time.

Q. —Government's Exhibit 1165 for identification, Government's Exhibit 1166 for identification, Government's Exhibit 1167 for identification, Government's Exhibit 1168 for identification. Now, Mr. Craig, would you look at those exhibits, and would you tell me if they are the copies of the reports that you made to the Antitrust Division?

A. These statistics are the statistics that I compiled, yes.

Mr. Hughes: Would you talk a little louder, please?

[fol. 2612] The Court: Yes, try and keep your voice up.

A. Yes, these statistics are the same statistics that I compiled.

Q. And the indication at the top is the stores that you visited?

A. That is correct.

Q. And upon the date that you visited those stores?

A. That is correct.

Q. And these are the products that you observed in the containers, as indicated?

A. That is correct.

Mr. McManus: Your Honor, the Government would like to offer Government's Exhibits G-1164 through G-1168, inclusive.

Mr. Hughes: Your Honor, may I have some examination?

The Court: You may cross.

By Mr. Hughes:

Q. Mr. Craig, will you first confine your attention to Exhibit G-1164 for identification. Do you have it? Mr. Craig, first, will you tell us how long you have been with the FBI?

A. I have been a special agent since July 15, 1957.

Q. Have you ever been connected with a can manufacturing company?

A. No.

Q. Glass manufacturing company?

A. No, sir.

Q. Plastic container manufacturing company?

A. No, sir.

Q. Food packer?

A. No, sir.

Q. Packer of toiletries and cosmetics?

A. No, sir.

Q. Packer of drugs and medicines?

A. No, sir.

Q. Packer of household chemicals?

A. No, sir.

Q. Are you a chemist?

A. No, sir.

The Court: Have you ever, Mr. Craig, had anything to do in a business way with any firm manufacturing or selling, at wholesale or retail, any of the items on Exhibits G-1164 through G-1168?

The Witness: No, sir.

Q. And so far as you can recall, have you ever had any contacts of any kind with any of the firms manufacturing any of the products on those exhibits, to the extent that you [fol. 2614] could remember their names?

A. No, sir.

Q. Now, have you ever been connected with an advertising agency?

A. No, sir.

Q. Have you ever been connected with any firm that conducts public opinion surveys or polls?

A. No, sir.

Q. And you don't profess to have any familiarity with the techniques of surveys or public opinion polls, do you?

A. No, sir.

Q. Now, going to Exhibit 1164 for identification, do I understand that the first page of that 1164 for identification, which contains a list, was prepared from another paper?

A. That is correct.

Q. I show you a paper, which has been identified as Court Exhibit 10 for identification in this action, and I ask you to look at page 8 of that exhibit, and also to the second paragraph of page 8, and I ask you to read that paragraph, and having done so, I would like to put a question to you.

A. (Reading) "Through the cooperation"—

[fol. 2615] Q. No, read it to yourself.

A. Oh, I'm sorry.

Q. Having read that, can you tell me whether the list of products which was prepared, was prepared by you or by some employee of the store?

A. No, sir; myself.

Q. Now turning to the second page of Plaintiff's Exhibit 1164 for identification, when you reported initially the results of your investigation, you submitted no such list, did you, as appears on the second page of Exhibit 1164 for identification?

A. Will you repeat that, please?

(Question read)

A. The list—

Q. Please answer yes or no.

A. There was no list, as refers—as the work would imply.

Q. And would it be correct to say that the material that appears on page 2 of Exhibit 1164 for identification was material prepared by you, based upon conversations that you had with some employee of the store?

A. There was no conversation. It was actual visual contact with this, this merchandise. I saw this merchandise. [fol. 2616] I saw the merchandise that we are referring to here, these 50 different lines. I went from—I went down the counter and observed each one of these lines.

Mr. Hughes: I move to strike it out as not responsive.
The Court: Denied.

Q. Now, Mr. Craig, did you, during the course of your investigation that day, have any conversations with any employee of the store?

A. Yes, the—

Q. That calls for an answer yes or no.

A. Yes.

Q. These items on the second page relate to the cosmetics and toiletry products; is that right?

A. That's right.

Q. And did you have a conversation with an employee of the store that pertained to the cosmetics and toiletry products that the store carried?

A. Yes, yes, sir.

Q. And did you have that conversation on the day in question?

A. On August the 30th.

Q. Yes.

[fol. 2617] A. This particular case.

Q. And in the course of that conversation did the employee of the store go into the subject of what product lines they had in cosmetics and toiletries? Did he go into that general subject with you?

A. No, I would say no; I would say no.

Q. Now, I show you the last paragraph on page 8 and the first paragraph on page 9 of Court's Exhibit 10 for identification; and ask you to look at it, and having looked at it I will put a question to you. I also meant to ask you to read the next to the last paragraph on page 8 of Exhibit 10.

A. All right, sir.

Q. Now, you see that, do you?

A. Yes.

The Court: Mr. Clerk, would you be good enough to let me have those Court exhibits for identification?

Q. Turning to the first or the next to the last paragraph on page 8, is it or is it not a fact that you got your information with respect to the number of different lines of these cosmetic and toiletry products which that store handled from Mr. Harling?

A. Yes, what I said there, yes, I would say that.

[fol. 2618] Q. So that the information that you got, to the effect that this department handles 50 different lines of these items came from Mr. Harling; is that correct?

A. Yes.

Q. In the course of a conversation with him; is that correct?

A. Yes.

Q. And is it also correct that the information contained in the last parenthetical reference on page 2 of Exhibit 1164 for identification came from Mr. Harling?

A. Yes.

Q. And from no other source?

A. No other source.

[fol. 2619] Q. And from no other source?

A. From no other source.

By the Court:

Q. Let me ask you this, Mr. Witness: I am now referring to the second page of 1164. Assuming that the information Mr. Harling gave you about 50 different lines of these items which are packaged in glass, plastic and tin containers, would the items listed there on that second sheet be the only items out of the 50 that were packaged in more than one of those types of containers?

A. Are you referring to the colognes, toilet waters?

Q. Yes. You have listed on this exhibit for identification some seven different items, and you say that there are 50, according to what Mr. Harling told you, lines of these items packaged in glass, plastic and tin containers. Do you follow me?

A. Yes, sir.

Q. I want to know if the six different categories that you have got here—if the numbers under the columns represent the total number of such items that are packaged in more than one of the three types of containers.

[fol. 2620] A. To the best of my knowledge, yes.

Q. So that in that whole store, as you understand it, according to the information given to you by Mr. Harling, these items listed are the only ones that are packaged in more than one kind of container?

A. That's correct.

The Court: All right.

By Mr. Hughes:

Q. And did Mr. Harling tell you that in the lines of perfumes, colognes, toilet waters, stick colognes, dusting powders and soaps they display in excess of 5,000 items?

Mr. McManus: I object, you Honor, as being hearsay. I thought that was the type of hearsay we were going to exclude.

The Court: Oh, no. Already there is information on this sheet offered in evidence which the witness testified is hearsay information.

Mr. McManus: Yes, your Honor.

The Court: If there is such hearsay information, I am going to permit Mr. Hughes to go into it further.

Mr. McManus: I thought you were going to exclude it if it was hearsay. I thought the witness observed this.

[fol. 2621] The Court: You offered it. I thought Mr. Hughes was questioning on his objection. Perhaps by the time he is through there will be no objection.

Mr. McManus: We will be glad to withdraw page 2 of Exhibit 1164.

Mr. Hughes: There is a pending question—

Mr. McManus: Your Honor, we are going to withdraw our offer on page 2 of 1164.

The Court: In any event I am going to permit the question.

(Question read.)

Mr. McManus: I have my objection.

The Court: Objection overruled.

A. That's correct.

By the Court:

Q. When you say 5,000 different items, do you know if he meant 5,000 different pieces or bottles and so forth, or 5,000 different kinds?

A. The 5,000 different bottles—the items of glass and plastic containers, if I may—

Q. Yes, you may.

A. Rich's department store advertises as the largest department store in the South, and this is a very big depart-

[fol. 2622] ment, this cosmetics and toiletries. It's a tremendous department. So 5,000 items for display alone, as I went over each one of the perfumes and the colognes and the toilet waters. It was tremendous, and I did go over that. Mr. Harling was contacted for the reason—

The Court: Well, we aren't critical of what he was contacted for.

By Mr. Hughes:

Q. And you would say this is the leading department store, would you, in Atlanta?

A. May I say it is advertised as the leading department store. I don't know.

Q. And this department that handles these colognes and so forth, is that a big department within that department store?

A. Yes.

The Court: How much space do they take up, would you say, as a rough estimate? As much as this courtroom or bigger?

The Witness: I would say five times this courtroom.

Q. This is the cosmetics and colognes?

A. That is correct, in the store, where these items are on [fol. 2623] display.

Mr. Hughes: Your Honor, I have some more questions. Your Honor, I am going to try to phrase the questions that I am now going into so that, if possible, they will cover all of the stores that this witness visited.

The Court: Very good.

Mr. Hughes: So that we will try to shorten it up.

By Mr. Hughes:

Q. In making these observations that you have alluded to, did you make any particular note of the quantities of the products in the containers that you noticed?

A. No, sir.

Q. Did you make any observation of the quality of the products in the containers that you noticed?

A. No, sir.

Q. Did you pay any attention to differences in preparation of the product?

A. No, sir.

Q. First let me ask you this: Did you visit any stores where foods were on sale or was your assignment confined exclusively to drug stores and department stores?

[fol. 2624] A. Drug stores—not drug stores, department stores.

Q. You did not go to any supermarkets or grocery stores?

A. No, sir.

Q. Did you go to the grocery department of any department store?

A. In Atlanta they don't sell groceries in department stores.

Q. I see.

A. No, sir.

Q. And, of course, you don't have any information, do you, as to the quantities of any of these items that you noticed and that appear on Exhibit G-1164 for identification; you have no idea of the quantities of those items that the store had in inventory that day?

A. No, sir.

Q. Or any day?

A. No, sir.

Q. And you don't know how many of those items they sold that day or any day; isn't that a fair statement?

[fol. 2625] A. Just from what Mr. Harling told me.

Q. Yes. But I say, you wouldn't have—

A. No first-hand knowledge, no, sir.

Q. And that would be true of any stores in the metropolitan Atlanta area, would it not?

A. Yes.

Q. And you don't have any such knowledge as to any store in the United States, do you?

A. No, sir.

Q. I am not sure that I asked you this, but are you a chemist?

A. No, sir.

Q. And you don't know anything about the formulation of any of the products which were packaged in cans or glass or plastic which you took note of on the occasion of your visit to these stores?

A. No, sir.

Q. And you couldn't tell whether any of these articles that you purchased were being test marketed, could you?

A. I didn't purchase any.

Mr. Hughes: I withdraw that.

Q. You couldn't tell me whether any of the packages of any of the articles which you observed were being test marketed? [fol. 2626] keted?

A. No, sir.

Q. And could you tell from the package of the article, the articles you observed, whether they were from obsolete stock or not?

A. No, sir.

Q. And could you tell from the package of the article that you purchased whether it had been packed as an experimental pack?

A. No, sir.

Q. I think I said "purchased." I meant to say "observed." You understood that?

A. Yes, sir.

Q. And do you know whether any of the articles were on sale that day?

A. What articles are you referring to.

Q. That is, whether they were on a special sale. Any of these—

A. I don't know, sir. I don't know whether they were on special sale.

Q. And you did not keep track of the prices, did you?

A. No, sir.

Q. You did not make price comparisons as between one [fol. 2627] container and another?

A. No, sir.

Q. And did you happen to notice whether any of the metal containers were aerosol containers?

A. The ones that I noticed I made a note of, sir.

Q. Could you tell us whether any of the packages of the articles which you observed are presently being packed in the same form or in the same type of container?

A. I don't know, sir.

Q. And you couldn't tell us the reason why any of the

packers put their product in the particular form of container, could you?

A. No, sir.

Q. And you don't have any information as to the method of filling these various containers that you saw; is that correct?

A. That's correct.

Q. Do you know the difference between high-density and low-density polyethylene?

A. No, sir.

Q. You were asked to observe containers made of plastic. What did you consider that that term embraced?

[fol. 2628] A. From my viewpoint, I would consider it a much heavier material than cellophane. Something that would hold a liquid.

Q. Do you know the difference between polyethylene and polystyrene?

A. No, sir.

The Court: Mr. Craig, referring now to G-1165, the second one, dealing with Davison-Paxon department store, I note on the second page, under a listing of various types of medical and toiletry products, the statement "This department handles a hundred different lines," et cetera.

Did that information come to you by your own observation or as a result of conversations with the store or with an employee of the store?

Mr. Hughes: Your Honor, I suggest that if he looks at pages 15 through 18 of Exhibit 5 for identification it may help him to answer your Honor's question.

The Court: Have you got Exhibit 5 there?

Mr. Hughes: I will get it, your Honor.

The Court: Will you read my question to the witness.

[fol. 2629] (Question read.)

The Witness: That came to me from my own observation. This 100 figure was furnished, as I stated, by Mr. Foilb, but to arrive at that 100 figure I went over these particular lines.

The Court: You checked it yourself?

The Witness: That's right, I went over the counters,

over the shelves, with him, because it is tremendous. You have to have somebody—

The Court: In other words, you went with him and he was talking, and at the same time you got whatever information from him you could?

The Witness: That's right, sir.

The Court: Go ahead, Mr. Hughes.

By Mr. Hughes:

Q. Do you consider that the plastic tubes are embraced within the definition of a container made of plastic?

A. Yes, sir.

Q. You saw that—

A. Based on Prell this morning.

Q. You would include that—

A. As a plastic container?

Q. Yes.

[fol. 2630] A. Yes.

Q. Would you include a toothpaste tube in the category of a container made of tin?

A. No. I didn't do that, no.

Q. I say, you did not consider that to be—

A. No. No, sir.

Q. Do you know the difference between cellophane and polyethylene?

A. No, sir.

By the Court:

Q. Mr. Craig, I am still not sure about something here. Let's take again page 3 of G-1165 for identification.

Now, here you list deodorants and you say number in glass, 1; number in plastic, 1; number in tin, 1. And then you say there were available 50 different lines. Does that mean that there was one particular deodorant that was packaged in glass and in plastic and in tin?

A. No. Of the 50 different lines, they came in glass and plastic containers, as far as I could determine from the shelves.

Q. What is the significance of the 1, 1, 1 figures?

[fol. 2631] A. The fact that these items did come in plastic, glass and tin.

Q. In other words, the 1 number doesn't mean that there is only one item?

A. That's correct.

Q. Does it mean that all 50 items came in glass and plastic and tin?

A. Yes. Yes, sir. As far as I was able to determine from the shelves.

Q. Let's take deodorants. Apparently, from what I can tell, there are liquid cream deodorants and roll-on deodorants. Do you mean to tell me that the roll-on deodorants came in glass and plastic and tin?

A. No, sir.

Q. Or that liquid cream deodorants came in glass and plastic and tin?

A. Liquid creams came in glass, plastic and tin.

Q. They did?

A. Yes.

Q. Now, have you any idea of what proportion of liquid deodorants was in glass, in plastic or in tin?

A. I couldn't establish that due to the volume of inventory. It would be tremendous to try to establish that.

[fol. 2631a] Q. In other words, from all that you know, out of the 50 items, one item was packaged in glass, 48 in plastic and one in tin?

A. Quite possible, yes.

[fol. 2632] Q. And your answer would be the same with respect to Suntan lotion, cream and men's lotion; is that correct?

A. That is correct.

The Court: All right.

Let me be sure I get this straight. Taking men's Suntan lotion or cream, the 50 various formulas, and according to these figures, of the 50 different formulas, one could have been packed in glass and 49 packed in plastic; is that right? As far as you know?

The Witness: Well, I know that one in glass. There is many, many more.

The Court: There were many, many more.

The Witness: That's right, sir.

The Court: Or do you know whether there were 49 in glass and one in plastic?

The Witness: I can't tell you.

The Court: All right.

By Mr. Hughes:

Q. Now, Mr. Craig, I call your attention to Court's Exhibit 5 for identification, and I call your attention specifically to page 15; do you see that?

A. Yes.

[fol. 2633] Q. Is it or is it not a fact that Mr. Foilb estimated that his department had on the shelves for display in excess of 10,000 packaged items in the field of perfumes, colognes, toilet waters, stick colognes, dusting powders, soaps and so forth?

A. That's right.

Q. And then did Mr. Foilb further advise that he desired to explain how some of these items were packaged?

A. I wanted to see them. I said I wanted to see these items, and we went from counter to counter.

Mr. Hughes: I move to strike it out as not responsive.

The Court: No, I will let it stand. You can ask another question.

Mr. Hughes: All right.

Q. My question was whether Mr. Foilb, F-o-i-l-b, said that he wanted to explain some things to you; is that right?

A. Yes.

Q. Yes?

A. Yes.

Q. And he did make explanations; is that right?

A. Yes, sir.

[fol. 2634] Q. And one of those explanations in that connection is Suntan lotion; is that right?

A. That is correct.

Q. And the explanation that he gave you is recorded on page 16 of Exhibit 5 for identification; is that right?

A. That's right.

Q. Did he give any indication to you as to the quantities of that particular item that came in plastic and the quantities that came in glass and the quantities that came in tin?

A. No, sir.

Q. And all that he told you was that there were approximately 50 formulas of brand names in various sizes; is that right?

A. That is what he told me.

Q. And that is the sum total of your knowledge on the subject, isn't it?

A. After my observation of these items.

Q. Well, I say, that is still the sum total of your knowledge on the subject?

A. Yes, sir; yes, sir.

Q. And you don't know any more than that right now?
[fol. 2635] A. No, sir.

Q. And without Exhibit 1165 in front of you you really have no independent recollection of the items that you saw in that store on that day; is that correct?

A. That is correct.

Q. And you really couldn't reconstruct what you saw in that store on that day without the benefit of this paper in front of you; is that correct?

A. That's right.

Q. And would that be true, really, of all the stores that you visited?

A. That is correct.

Q. You carry out many assignments in your work with the FBI, do you not?

A. Yes, sir.

Mr. Hughes: Now, your Honor, I think maybe I ought to do some of these things one by one.

As to 1164—just one moment, please—your Honor, as to 1164, we object to it on the grounds urged as to the admissibility of Exhibits 1160 through 63.

The Court: Well, I tell you, Mr. Hughes, since page 2 of that has been withdrawn and you object to it, page 2 is out. As to page 1—let me look page 1.

[fol. 2636] Mr. Handler: Is all of page 2 withdrawn?

The Court: Yes, the offer of page 2 is withdrawn.

Mr. Handler: The entire part of it?

The Court: Wait a minute. I don't seem to have 1164.

Mr. Hughes: I have a copy of it here.

The Court: No, I have got it here somewhere, Mr. Hughes. Here it is.

Well, I will let page 1 in for whatever it may be worth.

I overrule the objection.

Mr. McManus: Your Honor, could I ask one more question about 1164?

The Court: Yes.

Direct examination.

By Mr. McManus:

Q. Now, Mr. Craig, you explained to Mr. Hughes about what Mr. Harling had told you. Would you take a look at paragraph 2, page 8, of Court's Exhibit C-10.

Mr. Hughes: Page what?

Mr. McManus: Page 8. It starts with "Mr. Harling advised this department store handles approximately 50," and so forth.

[fol. 2637] Q. Now, Mr. Harling advised you that this department store handled approximately 50 different lines of perfumes, colognes, toilet waters, stick colognes, dusting powders, soaps; is that correct?

A. That is correct.

Q. And he said within this line are many fragrances for each of the above items. Now, he also estimated they carried 3,000 packaged items in that field; right?

A. That's right, sir.

Q. And that would be within the line of perfume, cologne, toilet waters, stick colognes, dusting powders and soaps; is that correct?

Mr. Hughes: I object to that, your Honor.

The Court: On what ground?

Mr. Hughes: It seems to me that it is argumentative. It is asking the witness not for any conversation, but apparently to interpret what the conversation was. The question was that something meant something. He was eliciting conversation.

The Court: Well, let me hear the question.

Mr. McManus: My question was, your Honor—

The Court: No, let the egoer read the question.

You are objecting to the question as to form?

[fol. 2638] Mr. Hughes: Presently as to form.

The Court: All right, let's have it, Mr. Reporter, please.
(Question read.)

The Court: Objection sustained as to form.

Q. Now, would you read that paragraph and tell me what Mr. Harling did tell you?

A. He stated that this—

Mr. Hughes: I object to the witness reading from a document. I have no objection to his refreshing his recollection.

Q. All right. Now take your time and—

The Court: Let me ask you this, Mr. Witness: You have read that paragraph; does it refresh your recollection as to what Mr. Harling told you?

The Witness: Yes, sir.

The Court: All right, to the best of your recollection, what did Mr. Harling tell you? What did he say to you and what did you say to him?

The Witness: Of the items we were discussing, cologne, perfumes, toilet waters, and so forth, this massive display, I asked him, "How many items of fragrances along with the perfumes do you have on display here?"

[fol. 2639] And he said, "There is 5,000 items here."

By Mr. McManus:

Q. Now, could you read the next paragraph, and would you tell me what Mr. Harling told you in the first sentence of the next paragraph?

A. With regard to the 50 different lines—

Mr. Hughes: Now, I object to the witness reading from a piece of paper.

The Witness: I am trying to establish—

Mr. McManus: He is not reading from the paper. That is not on that paper.

Mr. Hughes: All right.

A. Of the 50 different lines, I wanted to know what items—what he considered, what made up these lines and what these lines consisted of, and he said they consisted of rouge, tinted foundations, and all these items came in particular fragrances. In other words, the perfume starts

off with toilet water and it goes right on through to the soap. It includes everything, mascara, eyelash makeup, hair tint, everything. Some women desire the whole perfume.

The Court: And in each one of these they have different fragrances, different shades?

The Witness: Different shades, yes, sir.

[fol. 2640] The Court: In other words, an eye tint, for instance, you would get say 10 different shades of eye tint, and in each of those 10 different shades of eye tint you would get 20 different fragrances; is that right?

The Witness: That's right, Sir; that's right. It all comes the way some women desire the full, full—

By Mr. McManus:

Q. Did you ask them how they come packaged, in what type of container?

A. I asked them—

Mr. Hughes: I object to that as leading and suggestive. It's a Government witness.

The Court: No, no, I will permit it.

A. I asked him to show me these containers. He said, "I will take you to the counters."

We went down the line. This makeup comes in tin containers; this in a plastic; this is in a glass container, this particular fragrance. Now, there is 10 different fragrances along this line.

Q. But would you look at that second paragraph and refresh your recollection again, if you could, as to what he told you, as well as what you observed?

[fol. 2641] A. Yes, sir. He told me that these items came in plastic, tin and glass containers.

Mr. McManus: That is all, if your Honor please.

Cross-examination.

By Mr. Hughes:

Q. And after all of that, you came up with these figures that are on the second page of Exhibit 1164; is that right?

A. I would like to state that that is the same information that I gave his Honor there with the other.

The Court: That's right.

Q. That's right; you came up with the figures in the manner that you explained to his Honor.

A. Yes.

Mr. Hughes: I offer that page in evidence.

The Court: All right, you object to it?

Mr. McManus: Yes, your Honor.

The Court: Overruled.

Mr. McManus: Could I ask a question to clarify that?

The Court: You can ask any question you want within limits, but I think we are pretty well squeezing this lemon dry.

Mr. McManus: All right.

[fol. 2642] Redirect examination.

By Mr. McManus:

Q. On page 2 of Defendant's Exhibit S in evidence, I just want to ask you where you have "tinted foundations" and it says "number in glass and you have "1", was there only one that you saw in glass, or does that mean 1, or does that mean something else?

Mr. Hughes: I object to it as leading and suggestive and repetitious and improper redirect.

The Court: Overruled.

Q. Would you answer, please?

A. That applies to that tinted foundations come in glass containers.

Q. That doesn't indicate that only one tinted foundation came in glass containers?

Mr. Hughes: I object to that as leading and suggestive.

The Court: I think you have had your answer. I will sustain the objection.

Q. Now, is there anything further on 1164, which is in evidence, both pages of which are presently in evidence?

(Government's Exhibit 1164 for identification received in evidence.)

(Defendants' Exhibit S received in evidence.)

[fol. 2462c] Mr. Hughes: Your Honor, could we have a moment, please?

The Court: All right, we will take a brief recess at this point.

(Short recess.)

[fol. 2643] The Court: Mr. Craig, you may resume the stand.

Now, Mr. Hughes, you were about to cross-examine.

Mr. Hughes: Yes, sir. I wanted to return just for a moment to Exhibit G-1164 and page 2 of G-1164.

Mr. McManus: Excuse me, your Honor. Page 2 is not Government Exhibit 1164.

The Court: You want that separately marked.

Mr. McManus: Well, it is theirs.

○ The Court: All right, page 2 has been marked Defendants' Exhibit S.

By Mr. Hughes:

Q. Do you have that before you?

A. I don't have that.

The Court: All right. I will hand it to you. Defendants' Exhibit S.

Q. Mr. Craig, part of your instructions had to do with making observations of containers made of tin, isn't that right?

A. That's right, sir.

Q. And what would you embrace within the definition of containers made of tin?

[fol. 2644] A. May I take a specific item to explain it?

A. Well, you can illustrate by a specific item, yes.

A. All right, sir. For instance, in a suntan lotion, I would say it was a tin can to the best—

Q. So you would say tin cans were embraced within your concept of what a container made of tin is?

A. That's right, sir.

Q. Anything else?

By the Court:

Q. Let me ask you this: Are face powders included in there?

Mr. Hughes: It says rouge makeup, Judge.

A. No, rouge makeup is rouge itself. That's a different item.

Q. Does rouge makeup come in little jars; is that the idea?

A. Yes, sir, it comes in jars and it comes in little tin containers, little makeup tin containers, compacts.

Q. Like lipstick?

A. That's right.

Q. And if you had one of these lipsticks unscrewed and you put it—not on your lips, but if somebody puts it on her [fol. 2645] lips would you say that was a tin container?

A. Yes, sir.

Q. If you looked at it, aren't some of them made of gold?

A. Oh, coloring.

Q. You don't know whether it is gold or not?

A. No, sir.

Q. You don't know whether it is tin in the sense that tin cans are made of tin, do you?

A. I thought it was certainly light enough, the material itself. I would consider it tin myself. The rouge—lipstick container I thought was tin.

By Mr. Hughes:

Q. You don't know whether it is tin or bronze or aluminum?

A. No, sir.

Q. And you say that item of rouge makeup. Will you describe for his Honor the kind of container that was, if you can recall it? Can you recall it?

A. Not—I wouldn't say, no, sir.

Q. You really can't recall it?

A. No, sir, I can't.

The Court: All right. Now, are we moving to 1165, Mr. [fol. 2646] Hughes?

Mr. Hughes: Yes, sir.

The Court: All right. Let me have that back.

Mr. Hughes: That was 1164, your Honor.

The Court: Yes.

Mr. McManus: That was Defendants' Exhibit S you were referring to.

The Court: All right. Defendants' Exhibit S. You are quite right.

Mr. Hughes: Well, your Honor, as to the Exhibit G-1164, I object to that as incompetent upon the specific ground of incompetency I have heretofore urged; also, on the ground that it is irrelevant; also, on the ground of its immateriality; and I object more specifically to the last two pages of that upon the ground that these appear to be mere compilations based on hearsay declarations made to Mr. Craig.

The Court: Overruled.

(Government's Exhibit G-1165 for identification received in evidence.)

Mr. Hughes: Your Honor, I have no—

The Court: No questions with respect to that?

[fol. 2647] Mr. Hughes: No, but I object to it on all of the grounds previously urged as to all of the other exhibits, except those objections that I pressed as to additional pages—I think it was 1165.

The Court: Yes. All right. Now, just take a look at 1166 with me a minute, Mr. Witness, will you.

The Witness: Yes, sir.

The Court: I notice you have got shoe polish, number in glass and number in tin, and you have got two under the number in glass column, two under the number in tin column. Can you tell me whether the shoe polish in glass was liquid shoe polish?

The Witness: Yes, sir.

The Court: Can you tell me whether the number in tin was the little round ones of shoe polish about that big around that you open and that has got a paste in them?

The Witness: That's right, sir.

The Court: All right. I will make the same ruling and admit this for what it may be worth.

(Government's Exhibit G-1166 for identification received in evidence.)

[fol. 2648] By Mr. Hughes:

Q. And on that same 1166, do you see the item "Glue," and you have "Number in tin, 1"? Do you see that item?

A. Yes, sir.

Q. Was that in a tube? Was the glue in a metal tube?

A. No, sir, that was in a tin can.

The Court: All right, Mr. Hughes, now on 1167.

Mr. Hughes: Yes, sir. Now I am going to 1167.

Q. Did somebody in the Sears Roebuck store prepare the list for you at that store?

A. No, sir.

Q. Did anybody assist you in the preparation of the list?

A. No, sir.

Q. Did anybody in Sears Roebuck indicate that he would assist you in obtaining the list?

A. I would like to qualify that, if I may.

Q. Well: —

A. May I?

The Court: Yes.

[fol. 2649] A. In other words, this man accompanied me so I wouldn't be involved with the store detective or anyone else. This man was beside me all the time I was there. But in this case I went from counter to counter myself and he just stood behind me.

Q. And when you went to Sears Roebuck, did you identify yourself as an FBI agent?

A. I did.

Q. By the way, did you understand that this whole assignment that you were undertaking was one that they wanted you to complete as quickly as you possibly could?

A. I would say yes.

Q. And you went about it as expeditiously as possible; is that correct? Is that a fair statement?

A. Yes.

Q. Mr. Craig, you will observe pages 2 and 3 of Exhibit 1167 for identification; do you see them?

A. Yes, sir.

Q. And isn't it a fact that the information contained on those pages was prepared by you based on information that someone in the store furnished to you? And in that con-

nection I refer you to pages 20 and 21 of Exhibit 5 for identification.

[fol. 2650] A. I would like to state that it was the same as the other situation, where this man accompanied me as I went through the displays.

Q. Well, now, when you sent your report in, Mr. Craig, the only thing that you had listed in any kind of a list form was the material that appears on page 1 of 1167 for identification, isn't that right?

A. That's correct.

Q. So that the information that appears on page 2 that is in list form was something that you made up after you sent in that report, isn't that right?

A. That was made up at the same time to assist the Court, that they didn't have to read all through this, that they would have it—it would be easy to observe. That's why I made that up.

Q. Yes. Well, what you are saying is that you made up pages 2 and 3 of 1167 as a sort of tabulation of what was told to you and appears on pages 20 and 21, isn't that right?

A. That's right.

Q. Yes. So that you tried to put in graphic form what was told you and set forth in pages 20 and 21; is that right?

A. That's correct.

[fol. 2651] Mr. McManus: Your Honor, I object. I don't believe the witness has testified what in narrative form was told to him. He testified that he observed that fact.

The Court: That is my recollection of his initial testimony. Now, let's clear this up.

Mr. Witness, referring to pages 2 and 3 of G-1167, the information on those two sheets was the result of your personal observation or a conversation?

The Witness: Personal observation.

By Mr. Hughes:

Q. Well, now, Mr. Craig, when you made the original report, the only things you listed and reported were the items on page 1, isn't that right?

A. There it is, there. That's my original report.

Q. Yes.

A. That's the tabulation.

Q. That's right. And you didn't make any tabulation of the materials on pages 2 and 3 of 1167 for identification at that time, did you?

A. This is words, and these are figures. It's the same thing.

Q. I say, you did not make any tabulation, did you, on [fol. 2652] pages 20 and 21 of—

A. No.

Q. Instead what you did was to make a written report of what Mr. Bowman explained to you, isn't that correct?

A. No.

Mr. McManus: I object, your Honor.

The Court: He already said it wasn't a fair statement.

By Mr. Hughes:

Q. Did Mr. Bowman make any explanations to you? This calls for an answer yes or no.

Mr. McManus: Your Honor, I don't think he ought to be straitjacketed. I think he ought to be permitted to tell what he observed.

The Court: Well, I am not a great yes-or-no fellow. The yes-or-no answer doesn't impress me very much.

You may answer the question in your own way, Mr. Witness.

Mr. Hughes: Would you like the question again?

(Question read.)

A. That is a very ambiguous question. I can't answer [fol. 2653] that—

The Court: Did he say anything to you? You had a conversation?

The Witness: Yes, sir. Yes, sir. He did explain to me.

The Court: And in the course of conversation—

Mr. Hughes: Now, the witness said he did explain.

The Court: He did explain. All right.

By Mr. Hughes:

Q. And you reported that he explained something to you, didn't you? Did you or didn't you?

A. Yes, sir.

Q. Now, referring again to page 2 of 1167 for identification, do you see the parenthetical reference at the bottom of page 2, "They are packaged in varying types and formulas as well as fragrances"? Do you see that?

A. Yes, sir.

Q. Do you say that that was something that you observed?

A. No, that was told to me. This statement was told to me.

[fol. 2654] Q. And you see the parenthetical reference on page 3, the parenthetical references?

A. Yes, sir.

Q. That was all told to you by somebody?

A. No, sir. No, sir. I saw these items and went down the line. This is—

Q. And you are referring to the first parenthetical reference?

A. Yes.

Q. Now, let's take the reference to hair colorings. Is that parenthetical reference something that you observed?

A. I would like to explain it.

The Court: Yes, you may.

A. With hair colorings, hair colorings come in heavy textures, light textures, depending upon the hair, blond, brunetto, brown.

The Court: How did you learn that? Where did you get the information?

The Witness: By looking at each one of the containers.

The Court: That is, what it said on the container?

The Witness: That's right: for heavy hair, light hair, [fol. 2655] blond hair—there were 20 formulas for the women to use, all shapes, sizes and fragrances, to come back to the original perfume, even for their hair.

Q. And when you speak of 20 formulas, are you using the word "formula" in the sense what you have described

these variations in the product? Is that what you are—

A. Yes, sir. That's the way I used it.

Q. And would your explanation of the figures that appear on pages 2 and 3 be the same explanation as you gave to his Honor in the case of Exhibit 1164?

A. Yes, sir.

Mr. Hughes: I object to this, your Honor, upon the same grounds urged as to all of the preceding exhibits.

The Court: Same ruling?

(Government's Exhibit G-1167 for identification received in evidence.)

By Mr. Hughes:

Q. Mr. Craig, referring to Exhibit 1168, do you have that in front of you?

A. Yes, sir.

Q. When you made your original report, you did not sub-[fol. 2656] mit any list at all, did you?

A. I don't have that before me.

Q. Well, you don't have any recollection of having submitted any list, do you?

A. Well, I would like to see my report. In other words, I don't know.

Q. In other words, you would have to refer to the report to be able to answer me; is that right?

A. That's right, yes.

Q. Well, now, I show you pages 23 and 24 of Exhibit 5 for identification.

Mr. Hughes: Is 22 part of it?

Mr. McManus: Is this the Belk and Gallant?

By Mr. Hughes:

Q. I show you those pages and ask you, when you made your original report, whether you reported in anything like the form that appears on Exhibit G-1168 for identification.

A. No, sir.

Q. How did you go about preparing that?

A. Translated these words into figures?

Q. That is, translated the words that appear on Exhibit 5 to 1168; is that right?

A. If this is Exhibit 5—

[fol. 2657] Q. Yes.

A. Yes.

Q. And without the benefit of Exhibit 5 in front of you, you would have been unable to prepare Exhibit 1168 for identification?

A. That's right.

Q. Isn't that right?

A. That's right.

Q. You wouldn't have remembered that sort of thing, would you?

A. No, sir.

Q. And in the case of Belk and Gallant Company, you did see a Mr. Minton, didn't you?

A. Yes, sir.

Q. And you did have conversations with him; is that correct?

A. Yes, sir.

Q. And in those conversations he did make some explanations to you; is that correct?

A. Mr. Minton? No, sir. Mr.—well, yes. May I see it?

Q. Yes. Of course.

A. Mr. Minton—if I may—

Q. I asked you, did he make explanations to you?

[fol. 2658] A. Yes, he made explanations to where the items were and showed me on the counters; things like that.

Mr. Hughes: Your Honor, the same objection to G-1168 for identification as to the earlier, immediately preceding exhibits.

The Court: Same ruling.

(Government's Exhibit G-1168 for identification received in evidence.)

The Court: Mr. Witness, let me make it clear, all the various questions as to what the various numbers represent here, 1168, 1167, 1166, 1165, that were addressed to you by Mr. Hughes and by myself, your answers with respect to the same of those would have been the same in substance; is that right?

The Witness: That's correct.

The Court: All right. Let's get to 1169.

Mr. McManus: Your Honor, that is all Mr. Craig has.

The Court: Anything further from Mr. Craig?

(Witness excused.)

Mr. McManus: The next witness, your Honor, is Mr. [fol. 2659] Landsgaard.

WILLIAM O. LANDSGAARD, called as a witness by the government, being first duly sworn, testifies as follows:

Direct examination.

By Mr. McManus:

Q. Mr. Landsgaard, you are an agent with the Federal Bureau of Investigation?

A. Yes, sir.

Q. And from what office?

A. From the Atlanta, Georgia office, sir.

Q. And did you receive a request from the Antitrust Division of the Department of Justice to make a survey of certain stores in the Atlanta area during August and September of 1960?

A. Yes, sir.

Q. And what type of stores did you cover, Mr. Landsgaard?

A. I contacted the independent grocery stores in the Atlanta area.

Q. And you completed your canvass of these independent stores?

A. Yes, sir.

Q. And you made your report back to the Antitrust Division? [fol. 2660]

A. Yes, sir.

Q. I would like to show you Government's Exhibits G-1169, G-1170, 1171, 1172 and 1173.

A. Yes, sir.

Q. Now, Mr. Landsgaard, do those exhibits show the stores that you visited and the dates that you visited those stores?

A. Yes, sir.

The Court: Now, Mr. McManus—yes. All right. That is all right.

Q. And did you indicate on these exhibits the products that you observed in those stores that were packaged in either cans and glass, plastic and glass, plastic and cans, or glass, cans and plastic?

A. Yes, sir.

Mr. McManus: Your Honor, the government would like to offer Exhibits G-1169 through G-1173.

By Mr. Hughes:

Q. Mr. Landsgaard, do you have any independent present recollection of your observations at the Austin supermarket, without reference to the schedules that are there before you on the witness stand?

A. No, sir.

[fol. 2661] Q. And would that be true as to your observations at the other stores?

A. Yes, sir.

Q. So that apart from them, you really couldn't testify without the aid of those schedules; is that correct?

A. That's correct.

Mr. Hughes: I object to them as incompetent.

The Court: On what theory, Mr. Hughes?

Mr. Hughes: On the theory that the witness isn't really testifying. He is reading pieces of paper.

The Court: Oh, this is perfectly good past recollection. Overruled. Assuming that the proper foundation has been laid for past recollection.

Mr. Hughes: I will proceed, your Honor. I had some other questions.

The Court: All right.

By Mr. Hughes:

Q. Mr. Landsgaard, how long have you been with the Bureau?

A. As special agent, since February, 1958.

Q. And does that mean that you have had a experience [fol. 2662] with the Bureau than that?

A. Yes, sir. I was a clerical employee for approximately five years prior to that.

Q. And has that been your one and only occupation?

A. Yes, sir.

Q. You began with the FBI?

A. With the exception of my service time.

Q. And were you here this afternoon when the other witnesses were testifying?

A. Yes, sir.

[fol. 2663] Q. Were you able to hear the questions and the answers?

A. Most of them, sir.

Q. You had no connections of any kind with any can manufacturing company, had you?

A. No, sir.

Q. Or a glass manufacturing company?

A. No, sir.

Q. A manufacturer of plastic containers?

A. No, sir.

Q. A packer of any kind of food products?

A. No, sir.

Q. Drug products?

A. No, sir.

Q. Toiletries or cosmetics?

A. No, sir.

Q. Household items?

A. No, sir.

Q. You have never been connected in any way with a business that conducts surveys of any kind?

A. No, sir.

Q. And you are not a chemist by training or experience; is that right?

A. No, sir.

[fol. 2664] Mr. McManus: Your Honor, to save a little bit of time, the Government is willing to stipulate, as to

these questions that Mr. Hughes has just asked this witness, that if the other witnesses were asked those questions, any future witnesses from the FBI, they would testify that they had no connection or no such experience."

The Court: All right.

Q. Now, in connection with these observations you made at these various stores, you have made no note of any prices; isn't that correct?

A. That is correct, sir.

Mr. Hughes: Can we have the same stipulation on that, and as to all future witnesses?

Mr. McManus: They can, your Honor.

Mr. Hughes: Pardon me?

Mr. McManus: The defendants can. That is, future witnesses from the FBI.

The Court: Yes.

Mr. Hughes: Yes.

Q. Now, as you went about making these observations in the stores that you visited, did you make any observations of the quantities of the product in the containers that you observed?

[fol. 2665] A. No, sir.

Q. Did you make any observation of the quality of the products in the containers?

A. No, sir.

Q. Did you pay any attention to the differences in the preparation of the product?

A. Well, I might qualify that by saying, for instance, in some instances, where they had beets, pickled, sliced and diced, I made just a note of that in my mind as I went by. However, as far as any other preparation, I didn't.

Q. That happens to stand out in your memory: is that right?

A. Yes.

Q. And apart from that, did you pay any attention to differences in the preparation of the product?

A. No, sir.

Q. And can you tell from your observations whether the products which you observed were specially packed for special purposes, as, for example, dietetic purposes?

A. No, sir.

Q. And do you know whether any of the products which you observed were processed by any heat sterilization [fol. 2666] methods?

A. No, sir.

Q. Did you make any observation as to the amount of shelf space devoted to the different types of containers for what you determined to be similar products?

A. No, sir.

Q. And you have no information as to the quantities of any product inventory in any of the stores that you visited on the day that you visited them?

A. No, sir.

Q. Or on any other day?

A. No, sir.

Q. In any other stores in Atlanta or in the United States, is that right?

A. That's right.

Q. And you don't know the quantities of any of these items sold by any of these stores or any other stores; is that correct?

A. That is correct, sir.

Q. And you have no information, do you, with respect to the formulation of any of the products which you observed in cans or glass or plastic containers?

A. No, sir.

[fol. 2667] Q. Do you know what a light duty detergent is?

A. To myself, I would feel that it would probably be household, that a housewife might use for dishes which she would have her hands in, compared to a detergent for cleaning the floors, and so forth.

Q. Did you make any observations as to any of the products which you observed, whether they were packaged locally or at a distance?

A. No, sir.

Q. Could you tell from the package whether or not it was being test marketed?

A. I didn't take any notice of that, sir.

Q. Could you tell whether it was obsolete stock?

A. No, sir.

Q. Did you notice whether any of them were on special sale?

A. No, sir.

Q. Could you tell from the package of the article whether it had been packed as an experimental pack?

A. No, sir.

Q. Do you know the difference between high density and low density polyethylene?

A. No, sir.

Q. Do you know the difference between polyethylene [fol. 2668] and polystyrene?

A. No, sir.

Q. Do you know the difference between cellophane and any of the other products that I have mentioned?

A. I know that cellophane is more or less a real fine thin material.

Q. Can you identify and tell the differences between that and other types of film or flexible packaging?

A. No, not offhand.

Q. Can you tell from the package of the article that you observed whether or not the packer who packed it is still packing it in the same type of container today?

A. I didn't get that question, sir.

(Question read.)

A. I don't know, sir.

Q. Can you tell from the package of the product that you observed or from any other source why the packer packaged it in the particular type of container that you observed it in?

A. No, sir.

Q. You never spoke to any of these packers of these products, did you?

A. No, sir.

[fol. 2669] Q. You don't have any information as to the method of filling the containers, do you?

A. No, sir.

Q. In these food stores that you visited, did you notice whether they had any frozen foods for sale?

A. I recall that they did have counters for it. However—

Q. But you don't recall what the items were; is that right?

A. No, sir.

Q. Do you recall whether they had dehydrated foods for sale?

A. I believe several of them did. However, I made no note of that either.

Q. Did any of them sell fresh fruits and vegetables?

A. Yes, sir.

Q. And fresh meat?

A. Yes, sir.

Q. Fresh dairy products?

A. Yes, sir.

Q. You have never participated in the making of any surveys, have you, public opinion surveys?

A. No, sir.

[fol. 2670] Q. And you don't profess to be experienced in the techniques of such surveys; is that correct?

A. No, sir.

Mr. Hughes: Your Honor, I will return to my notes now as to these specific exhibits.

The Court: All right.

Q. Will you define for me what you understand by the term "a container made of plastic"?

A. If I might state this: I was in here this morning when they had the Prell Shampoo. That is my term of plastic as a container.

Q. You would consider that a container—

A. Plastic container, yes.

Q. What else would you consider a plastic container?

A. Can't think of any examples offhand right now, sir.

Q. How would you define containers made of tin? What would be embraced within your idea of containers made of tin?

A. I might take an example like Libby's tomato juice. That is a tin, what I would call a tin. Also, these Aerosol cans, which are pressurized cans, would be, in my estimation, tin; shoe polish and items of that type.

[fol. 2671] Q. How about tubes, toothpaste tubes?

A. No, sir; I wouldn't consider those as a can.

Q. And you didn't so consider them when you were making your observations?

A. No, sir.

Q. Did you make any differentiation between dry, liquid or solid products?

A. No, sir; not on my list.

Mr. Hughes: Your Honor, again in the possibility of saving time, could we have a stipulation that if I put these sort of questions to the other agents—

The Court: Yes, I would think so.

By the Court:

Q. Mr. Witness, you heard the questions that were put to the first of your agents, Mr. Sloan, did you?

A. Yes, I heard most of them.

Q. He was the man who went to the other food stores.

A. Yes, sir.

Q. Would you say that your answers to the questions with respect to your lists, Government's Exhibits 1174 and [fol. 2672] so forth, would be the same as Mr. Sloan's answers with respect to his lists, in substance?

A. With regard to my list, sir, in regards to 1173, if I might bring that up, under "barbecue sauce," there is a number 6 in glass and on- in can. Now that 6 would mean there were six different brands packaging them in cans, or in glass, rather, pardon me, and under "cans" there is a figure 1, which meant that I indicated there was one brand which packages it in cans and 6 brands packaged in glass.

Q. All right. Well, let's get down to the next item, olives.

A. Yes, sir.

Q. That would be six different brands of olives packed in glass and three different brands packed in cans, would it?

A. Yes, sir.

Q. Would there be any difference or any distinction here between ripe olives, stuffed olives, whole green olives, pitted olives?

A. No, sir.

Q. In other words, you wouldn't be able to tell from this list whether certain kinds of olives were in cans and certain kinds of olives were in glass?

[fol. 2673] A. No, sir; that is correct.

Q. Now here is apples, for instance, two in glass and five in cans. You wouldn't be able to tell whether it was

a baked apple in glass or apple sauce in glass, or spiced apple in glass?

A. No, sir.

Q. In other words, it could be that there were spiced apples and baked apples in glass, and all the apple sauce was in cans; is that right?

A. That is correct.

Mr. Hughes: Your Honor, I was wondering whether Mr. McManus was prepared to stipulate that as to any remaining FBI witnesses, if I were to put the questions to them that I have just put to this witness about his knowledge and observations, whether their answers would be to the same effect?

Mr. McManus: Can you so stipulate, Mr. McManus?

Mr. McManus: With one clarification, your Honor, Mr. Landsgaard did indicate that he would have considered Prell as a plastic container, and I would want it understood very clearly that by so doing, that that does not exclude all other plastic containers, because there were other types that he could not remember.

[fol. 2674] The Court: Well, he didn't say that this was the only thing he considered to be a plastic container.

Mr. McManus: No, but I wanted to make that clear.

The Court: Otherwise, you will stipulate with respect to all the other FBI agents?

Mr. McManus: Yes.

The Court: That their answers, in substance, to the various questions that might be asked them would be the same as those asked of Mr. Landsgaard, or with respect to cosmetics and toiletries, the same as the previous witness?

Mr. McManus: Well, I would rather not with respect to those cosmetics and toiletries, but I would with respect to every other one.

Mr. Hughes: Well, I don't—

Mr. McManus: Well, with respect to cosmetics and toiletries, if any witness testifies I would be so willing to stipulate, because I think the witness got a little confused in cosmetics and toiletries.

The Court: Well, are there cosmetics and toiletries on Mr. Landsgaard's list?

Mr. McManus: No, there is not, I don't believe.

The Court: Now, is there anything further on Mr. [fol. 2675] Landsgaard, Mr. Hughes?

Mr. Hughes: Yes, sir. I have to go through these individual exhibits, your Honor. It takes a little time. I am sorry.

The same objection as to Exhibit G-1169 for identification.

The Court: Now, are we going to take these seriatim?

Mr. Hughes: Yes, I would, your Honor, because I have to look and see if I have any special notes.

The Court: All right, same ruling with respect to 1169.

(Government's Exhibit 1169 received in evidence.)

Mr. Hughes: Same objection as to Exhibit G-1170.

The Court: Same ruling.

(Government's Exhibit 1170 received in evidence.)

The Court: On 1171, I notice you have got an item "spices" here, and you have 16 in cans and 5 in glass. I gather from that that there could have been 16 different spices, each packed in tins, and 5 other different spices [fol. 2676] packed in glass; is that right?

The Witness: That is correct, sir.

By Mr. Hughes:

Q. On that same page, do you see the first item "beans"?

A. Yes, sir.

Q. What does that term embrace?

A. Well, as I recall, that would have embraced the baked beans and the pork and beans.

Q. Well, does it or doesn't it?

A. Yes, as well as I recall.

Q. Well, did you differentiate between baked beans and pork and beans?

A. No, sir.

Q. Does it include anything like green beans?

A. No, sir.

Q. Lima beans or any of those products?

A. No.

Mr. Hughes: Same objection as to G-1171.

The Court: Same ruling.

(Government's Exhibit 1171 received in evidence.)

The Court: Now turning to 1172 and going to the second page of 1172, here you have got aspirin "number in glass," "number in cans," 4 and 4.

[fol. 2677] As far as aspirin is concerned, do you include as cans the little tin boxes that come with 10 aspirin tablets in it, or 20 aspirin tablets?

The Witness: Yes, I would call those tins.

The Court: And if you bought a hundred aspirin tablets, they would come in glass, wouldn't they?

The Witness: Yes, sir.

By Mr. Hughes:

Q. The 4 that you saw in cans were of the sizes that his Honor just questioned you about; is that right?

A. As well as I recall, yes, sir.

Mr. Hughes: Same objection as to G-1172.

The Court: Same ruling.

(Government's Exhibit 1172 received in evidence.)

Mr. McManus: Could I ask one question, your Honor?

The Court: Yes.

By Mr. McManus:

Q. When you are talking here about aspirin and you say that there 4 in cans, and you are talking about the small pocket type of can, we call it, were the 4 aspirin, do you recall one way or the other, the number that the bottle contained, or approximately—

A. No, sir, that would be, for instance, one would have [fol. 2678] been Bayer, St. Joseph.

Q. Yes, but do you recall the size?

A. No, sir; I don't recall the size, actually.

Q. You don't know whether it was 20 or 50 or a hundred?

A. No, sir. As well as I can recall, the majority of those are small, what I would call in cans, are the small—

The Court: Pocket size.

A. —tins.

Q. And would they be the same in glass, small glass type of aspirin?

A. I don't know the number, but I feel, as I know, the little glass bottles would hold probably more than what they would in the little cans.

Q. But were you talking about the little glass bottles when you marked the 4 down?

A. Yes, sir; that is correct.

The Court: All right.

By Mr. Hughes:

Q. To your observation, the glass bottles contain more product than the tin containers: is that correct? I am referring to aspirin.

[fol. 2679] A. Yes, as well as I can recall.

Mr. Hughes: Same objection.

The Court: Same objection to 1172 by the defendant. Same ruling.

Mr. Hughes: That was 1172, your Honor?

The Court: Yes.

Now, 1173 is the last one of Mr. Landsgaard's.

Mr. Hughes: Same objection, if your Honor please.

The Court: Same ruling.

(Government's Exhibit 1173 received in evidence.)

Mr. Hughes: That is all.

Mr. McManus: That is all.

The Court: Anything further from Mr. Landsgaard?

Mr. McManus: No, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. McManus: Mr. Golden.

JOHN J. GOLDEN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

[fol. 2680] Direct examination.

By Mr. McManus:

Q. Mr. Golden, you are an agent of the Federal Bureau of Investigation?

A. Yes, sir.

Q. And what is your home office?

A. I am assigned to the Atlanta, Georgia, division.

Q. In August of this year did you receive a request from the Antitrust Division of the Department of Justice to conduct a survey of certain stores in the Atlanta area?

A. Yes, sir.

Q. And did you conduct the investigation and report back to the Antitrust Division of the Department?

A. Yes, sir.

Q. And that covered a period of August and part of September of 1960?

A. Yes, sir.

Q. Mr. Golden, I show you Government's Exhibits 1174, 1175, 1176 and 1177; do these exhibits indicate the stores that you visited in Atlanta and the dates that you visited them?

A. Yes, sir.

Q. And does this exhibit also list the product that you [fol. 2681] observed, which was packed in either cans, in glass, glass and plastics, cans and plastic, or plastic cans and glass?

A. Yes.

Mr. McManus: Your Honor, the Government offers Exhibits G-1174 through G-1177, inclusive.

By the Court:

Q. Have you got any independent recollection as to these figures, Mr. Golden?

A. Possibly one or two, your Honor.

Q. Well, generally no?

A. Generally no, I don't think I could—

Q. How are these made up? Were these made up from notes you took at the time?

A. Yes, sir.

Q. Of your observation?

A. Yes, sir.

Q. And those notes were translated into these lists?

A. Yes, sir.

Q. Do these lists represent an accurate translation of the notes and the notes of your observation; is that right?

A. Yes, sir.

[fol. 2682] The Court: All right.

Now, Mr. Hughes.

Mr. Hughes: Your Honor, I don't know where we are on that proposed stipulation. It was left so uncertain.

The Court: I think we ought to try and do it. I think we ought to try and get this last Atlanta agent out of here, if we can.

Mr. Hughes: I don't have too many questions. I think I had better quickly go through them.

The Court: I think that is the simplest way. I think we'd better do it that way.

Cross-examination.

By Mr. Hughes:

Q. Mr. Golden, how long have you been with the Bureau?

A. I started with the Bureau in 1950, sir.

Q. Before that what did you do?

A. I had a number of jobs.

Q. Could you just—

A. Well, I was a law clerk; I was an elevator operator; stock boy.

Q. Well, let me get at it this way: Did you hear the testimony of the preceding witness?

A. For the most part, yes, sir.

[fol. 2683] Q. Well, did you have any jobs at any time with any of these can or glass or plastic manufacturing companies?

A. No, sir.

Q. And had nothing to do with public opinion surveys?

A. No, sir.

Q. Or food container—food packing?

A. No, sir.

The Court: I think we have a stipulation already on the record to that effect.

Mr. Hughes: All right.

The Court: I think that is covered.

Q. Now, in connection with your assignment, can you tell us what you understood the term "containers made of plastic" to mean?

A. Well, when I thought of plastic, I thought of the item referred to earlier today, Prell, and then I think of the squeeze type deodorant bottle as a plastic type container.

Q. That about embraces your—

A. That is what I was thinking of when I considered a plastic container, yes, sir.

Q. Do you know the differences between polyethylene [fol. 2684] high density, low density products?

The Court: Will you stipulate that none of the agents know the difference between the various polys?

Mr. McManus: We will so stipulate, your Honor.

The Court: All right.

Q. And you are not a chemist?

A. No, sir.

Q. Now, I am not sure about this, whether we have a stipulation on this, but did you make any observation with reference to prices of the article you saw?

A. No, sir.

Q. Did you make any observation of the quantities of the product in the containers you observed?

A. Any what, sir? I'm sorry.

Q. Did you make any observation of the quantities of the product?

A. No, sir.

Q. Did you make any observations of the quality?

A. No, sir.

Q. Did you pay any attention to differences in preparation of the product?

[fol. 2685] A. Will you explain what you mean by "preparation"?

The Court: Well, how the product was prepared? Did you go into the difference in the way the thing was made up?

The Witness: Oh, no, sir, not the construction of it, no.

Q. Now, could you tell whether the products which you noticed were specifically packed for special purposes?

A. No, sir; I couldn't tell.

Q. Do you know whether any of the products which you observed were processed by any heat sterilization methods?

A. No, sir.

Q. Did you make any observation as to the amount of shelf space devoted to the various items?

A. No, sir.

Q. And you have no knowledge of the quantities of any of these items which the store had in inventory that day or any day?

A. That is right; no, sir.

Q. Or any other store anywhere?

A. No, sir.

Q. You don't know what quantities of these products [fol. 2686] any store sold at any time, do you?

A. No, sir.

Q. Do you have any information whatever with respect to the formulation of any of the products which you observed packaged?

A. No, sir.

Q. I think that is already covered.

Did you notice whether any of the products which you observed were packaged locally or at some more distant place?

A. No, sir; I didn't.

Q. Did you notice whether they were being test marketed?

A. No, sir.

Q. Or whether it was an experimental pack?

A. No, sir; I didn't.

Q. Whether they were on special sale?

A. No, sir.

Q. Or whether they were obsolete stock?

A. No, sir.

Q. Do you know whether the packages as you observed

them are being packaged today in the same type container that you observed them in?

A. I don't know for sure, no, sir.

[fol. 2687] Q. And could you tell from the package of the product or from any other source why the packer used the particular container he did?

A. No, sir.

Q. Did you observe whether these stores had frozen foods on display for sale?

A. I don't—I didn't observe it. I would assume that the type of store—

The Court: These are all drug stores. These are not food products, primarily.

The Witness: Yes, sir; I contacted drug stores.

Q. Did you visit any food stores at all?

A. No, sir.

Q. Now will you give me your definition of a tin container, what would be embraced in that?

A. Well, by example, the tin can similar to the aspirin container, referred to in earlier testimony, and a—there was a bug killer product, I don't recall the name, that was packaged in a can. I can't tell you the size of it, but that is what I had in mind, or shoe polish. That would be my thoughts on tin line.

Q. Would it include metal tubes?

A. Are you referring to a toothpaste type tube?

Q. Yes, sir.

[fol. 2688] A. No, sir; I do not take that into consideration.

Q. And on Exhibit G-1174 for identification, where you have the item "toothpaste in cans," can you describe for us what kind of a can that was?

A. It would have been an Aerosol type can. I did not differentiate.

Q. Did you make any differentiation between dry, liquid or solid products in your observation, or in preparing your list?

A. So far as the product, no, sir; I was only interested in container.

Q. And again referring to Exhibit G-1174, I see a refer-

ence there to "baby bottles"; did you regard them as a container?

A. Yes, sir; I did.

Q. When you observed them, they were empty bottles, were they not?

A. Yes, sir.

Mr. Hughes: I object to Exhibit G-1174 for identification on the same grounds.

The Court: Same ruling.

(Government's Exhibit 1174 received in evidence.)

Q. Can you tell me what, referring now to Exhibit [fol. 2689] G-1175 for identification, what the numbers mean on the schedule?

A. In compiling my schedules, rather, my notes, I considered the brand and what the product was, and if similar manufacturer had the item in, say, for instance—well, taking the first one, nasal spray, for example, if the same manufacturer had it in both plastic and glass, I counted up the plastic containers and the glass containers.

Q. Well, were you doing this just by brands?

A. Yes, sir; that was the line I pursued.

[fol. 2690] Q. Does that mean that as to nasal spray you observed five brands?

A. Yes, sir.

Q. Does it indicate how many types of containers you observed within any particular brand?

A. No, sir.

Q. Would that be true of glass also?

A. Yes, sir, it would be.

The Court: As far as shave cream is concerned on 1175, were those all aerosol, some aerosol glass and some aerosol can?

The Witness: The cans, as I recall, your Honor, were aerosol type. I don't recall any aerosol glass.

Mr. Hughes: Same objection.

The Court: Same ruling.

(Government's Exhibit G-1175 for identification received in evidence.)

Mr. Hughes: The same objection as to G-1176.

The Court: Same ruling.

(Government's Exhibit G-1176 for identification received in evidence.)

The Court: On 1177, would you be able tell us, Mr. [fol. 2691] Golden, with respect to the athlete's foot remedy in cans, which of those were powders and which, if any, were liquid?

The Witness: I can recall, I believe, one that was a powder in a can, your Honor; but just based on my recollection, I believe those in plastic were liquid. I can't be sure.

The Court: Those in plastic were liquid and those, generally speaking, in cans were powders?

The Witness: Powder type, yes.

The Court: All right.

By Mr. Hughes:

Q. Mr. Golden, I show you page 11 of the Court's Exhibit 5 for identification. I show you both pages 10 and 11 and ask you whether that is a copy of your report, or one of your reports?

A. Yes, sir; it bears my initial on there.

Q. And that is your report with regard to your visit to the Lane Rexall drug store?

A. Yes, sir.

Q. I call your attention to the last paragraph of page 11. Do you see that?

A. Yes, sir.

Q. Did you have any conversation with the pharmacist [fol. 2692] at that store?

A. Yes, sir. I talked to him.

Q. And did you learn that that store handled two cosmetic products which were packed in glass and two in a theatrical can?

A. Yes, sir.

Q. On page 1 of Exhibit 1177 for identification you have an item there, fever thermometer.

A. Yes, sir.

Q. Did you consider that to be a container?

A. I considered the plastic container that the glass thermometer came in. I took it all into consideration.

Q. Well, you were really referring to the plastic container in which the thermometer came; is that right?

A. Yes, sir. Yes, sir.

Q. Were you including the thermometer in it or just the container in which it came?

The Court: Well, Mr. Hughes, what difference does it make? It is only—

Mr. Hughes: All right. Same objection.

The Court: Same ruling.

Is there anything anybody wants to ask of Mr. Golden now?

[fol. 2693] (Government's Exhibit G-1177 for identification received in evidence.)

By Mr. McManus:

Q. Mr. Golden, you listed in your exhibit that one of the liquid detergents came in a plastic container.

A. Yes.

Q. Is this generally the type of container, Government's Exhibit 1054?

Mr. Hughes: I object, your Honor.

The Court: Overruled.

A. Yes, sir.

Q. Would you consider Government's Exhibit 1149 as a plastic container?

A. I would like to see that, if I may, sir. Yes, sir.

Q. And would you consider Government's Exhibit 1p90 as a plastic container?

A. Yes, sir.

Mr. McManus: Your Honor, that is all we have of Mr. Golden.

The Court: Anything further from this witness?

Mr. Hughes: Just one moment, your Honor.

[fols. 2694-2696] Cross-examination.

By Mr. Hughes:

Q. Would you describe for his Honor the case in which this fever thermometer came, as you observed it?

A. The fever thermometer?

Q. The case.

A. It comes in two parts: a screw type that has the pen or pencil type clip on it.

Q. That is what you observed?

A. That is what I observed, yes.

Mr. Hughes: No further questions.

Mr. McManus: Your Honor, I have no further questions of this witness, except to say that in so far as the stipulation, we have other witnesses. Mr. Hughes is reading from a list. If he would give me a copy of the list, I think we would be able to check off 90 per cent of the list and save some time.

Mr. Hughes: I consider the paper to be a work product, your Honor.

The Court: All right. You may be excused, Mr. Golden.

(Witness excused.)

[fol. 2697]

New York, October 6, 1960, 10:30 a.m.

Trail resumed

(The following took place in chambers):

Mr. Hughes: Your Honor, overnight I have worked with Mr. McManus on the problem of stipulating some of the subjects of cross examination and, as a result, I understand that Mr. McManus is prepared to indicate a stipulation to you:

The Court: the stipulation, as I understand it, gentlemen, has been substantially agreed upon, and it is your present purpose to inform the Court of what the stipulation is.

Mr. McManus: That's correct.

Mr. Hughes: That's correct.

The Court: Will you read the stipulation, please.

STIPULATION OF PLAINTIFF RE: REMAINING FBI WITNESSES

Mr. McManus: The plaintiff stipulates that if the remain-
[fol. 2698] ing FBI witnesses which it will call to testify
were cross examined with respect to the following matters
each of them would answer substantially as follows:

That he had never been employed by a can manufacturer,
a glass container manufacturer, a plastic container manu-
facturer or a firm engaged in conducting surveys or polls
of public opinions or consumer preference, and that he is
not experience- in the techniques of such polls or surveys;

That he has never been employed by a packer who uses
any of the kinds of containers that he observed during
the course of his assignment;

That he has not been in communication with any of the
packers whose products he has stated that he observed;

That he is not a chemist;

That he does not know the difference between high-den-
sity and low-density polyethylene, nor the difference be-
tween either of them and polystyrene;

That he took no note of and made no list of products
in the stores which he visited which were packed in only
one type of container;

That he took no note of and made no record of prices
[fol. 2699] of the products which he observed;

That he took no note of and made no record of the
quantities of products in the containers he observed;

That he took no note of and made no record of the qual-
ity of the products in the containers he observed;

That he took no note of and made no record of the dif-
ferences in the preparation of the products in the containers
he observed;

That he could not say whether the products which he
observed were specially packed for special purposes, such
as, for example, diatetic purposes;

That he did not know whether any of the products which
he observed were processed by heat sterilization;

That he made no observation as to the amount of shelf
space devoted to the different types of containers used to
package what he considered to be similar products;

That he has no information as to the quantities of any of the products which he observed in inventory in any store, or as to the quantities sold in any store in any period of time, or as to the quantities sold in the metropolitan area [fol. 2700] of the community in which the observations were made, or as to the quantities sold in the United States at any time;

That he has no information with respect to the formulation of any of the products which he observed to be packaged in cans or glass or plastic;

That he did not notice whether any of the products which he observed were packaged locally or at a distance;

That he could not tell from the package of any article which he observed whether or it it was being test-marketed, or whether or not it was obsolete stock, or whether or not it had been packed as an experiment, or whether or not it was on special sale on the date of the observation;

That he couldn't tell from the package of any article which he observed whether or not the packager who packaged it is still packing in the same type of container;

That he could not tell from the package of the products that he observed or from any other source why the packer chose the particular type of package for the product;

[fol. 2701] That in the case of stores whose principal business is the sale of foods, he noticed that they carried fresh fruits and vegetables, fresh meats and fresh dairy products, that they carried frozen foods and foods in dried or dehydrated forms, but that he made no particular observations as to what the particular products were;

That he has no information as to the method of processing the various products he observed and no information as to the method of filling the containers he observed.

The Court: All right.

[fol. 2702] ALBERT A. HUSTEDT, called as a witness on behalf of the Government, was duly sworn.

The Court: What exhibits are you going to refer to with this witness?

Mr. McManus: Your Honor, I would like to refer to Government's 1178 and also to Court's Exhibit 8, and that would run 1 through 20. Excuse me. 8 and 9, the entire matter in Court's Exhibits 8 and 9. The Government's Exhibit was 1178 only.

The Court: All right.

Direct examination.

By Mr. McManus:

Q. Mr. Hustedt, you are a member of the Federal Bureau of Investigation?

A. Yes, I am.

Q. You are an agent, in other words?

A. Yes.

Q. And in August of this year did you receive a communication from the Antitrust Division of the Department of Justice, asking you to conduct an investigation in the [fol. 2703] Los Angeles area?

A. I did.

Q. And did this investigation require you to go to certain stores in the Los Angeles area and to examine the shelves of those stores to ascertain products which were packaged in cans and glass, glass and plastic, cans and plastic, and cans, glass and plastic?

A. It did.

Q. And did you conduct that investigation?

A. Yes, sir.

Q. And did you report back to the Antitrust Division of the Department of Justice?

A. Yes.

Q. I show you Government's Exhibit 1178, and also hand you copies of what are Court's Exhibits 8 and 9. Now referring to Government's Exhibit 1178, could you tell me what that is?

A. Yes, sir. It is a compilation of the list of products that I found, packaged in the manner indicated, as a result

of investigation at the five chain grocery stores, five independent grocery stores, five drug chain stores and five department stores.

Q. And Court's Exhibits 8 and 9, what are those?
[fol. 2704] A. Those are reports I prepared which reflect results of my investigation.

Q. And Government's Exhibit 1178 is a compilation of the products that are in Court's Exhibits 8 and 9?

A. Yes, they are; sir.

Q. And Court's Exhibits 8 and 9 break down Government's Exhibit 1178, so you can ascertain at what stores you saw a particular product which is listed in Government's Exhibit 1178?

A. That is correct, sir.

Mr. McManus: Your Honor, what we would like to do here is offer Government's Exhibit 1178. We would also in this case like to offer Court's Exhibits 8 and 9, because it is an explanation of Government's Exhibit 1178.

The Court: Well, it seems to me, Mr. McManus, that you ought to lay a little more foundation of what this agent actually did in this investigation. It is your burden, I think, to lay the foundation, and while we departed somewhat from that yesterday, I think we should go a little farther.

Mr. McManus: I see.

Q. Now, Mr. Hustedt, could you tell me what were your instructions from the Antitrust Division in regard to this [fol. 2705] investigation?

A. I'm sorry. I didn't get that.

Q. What were your instructions from the Antitrust Division in regard to this investigation?

A. My instructions were to visit five chain grocery stores, five independent grocery stores, five chain drug stores and five department stores, and to compile a list of items that were packaged both in cans and glass, glass and plastic, cans and plastics, and in all three.

Q. And what stores did you visit? Would you look at your list there and tell me the stores that you visited?

A. Yes. The names of the individual stores?

Q. Yes.

A. Yes. As far as the chain grocery stores are con-

cerned, I visited Ralph's Grocery Company. Do you want the addresses, too?

Q. We might as well have them for the record.

A. It is located at 3rd Street and Vermont Avenue, in Los Angeles. Safeway Store No. 32, which is located at 230 South Vermont Avenue, Los Angeles; Alpha Beta Food Market, which is located at 5071 Rodeo Road, Los Angeles; Thrifty Mart Store, which is located at 3621 South La [fol. 2706] Brea Avenue, Los Angeles; Market Basket, which is located at 6298 West 3rd Street, Los Angeles.

Then for the independent markets, I visited the Beyerly-Normandie Market, 4213 Beverly Boulevard, Los Angeles; Midtown Market, 2882 West 9th Street, Los Angeles; Bi-Rite Market, 2913 North Broadway, Los Angeles; LaSalle Market, 1900 West Washington Boulevard, Los Angeles; Lord's Market, 863 South Vermont, Los Angeles.

For the department stores: May Company, 7th and Hill Street, Los Angeles; Bullock's Department Store, 659 South Broadway, Los Angeles; The Broadway, located at 401 South Broadway, Los Angeles; W. T. Grant Company, 437 South Broadway, Los Angeles, and J. W. Robinson, 600 West 7th Street, Los Angeles.

And for the drug chains: Thrifty Drug Company, 427 South Broadway; Charm Drug Company, which is an agency of the Rexall Drug Company, 1602 West 7th Street, Los Angeles; Manray, 3170 Wilshire Boulevard, Los Angeles, which is an agency of the Owl-Rexall Drug Company; Sav-on-Drugs, 1701 South Western Avenue, Los Angeles; D & B Pharmacy, 11000 South Vermont Avenue, Los Angeles.

[fol. 2707] That is it, sir.

Q. All right. Now let us take, for example, the first food store that you entered, Mr. Hustedt. How did you carry out your assignment in the first store, for example?

Mr. Hughes: Will he identify that store?

Q. Will you identify that store?

A. Yes. It is Ralph's Grocery Company.

The Court: What was Ralph's Grocery Company? What was the store like, a great big supermarket?

The Witness: Yes, sir. In my opinion it is one of the largest—the largest—one of the largest stores in the area.

Q. And would you please tell us what your procedure was in carrying out your assignment?

A. Yes. Since Ralph's was the first store that I visited, I contacted the comptroller of the store and discussed the situation and told him what I desired, and he related to me that—

Mr. Hughes: I object to this. I object to any conversations.

The Court: Yes. Please don't give what was said. In other words, you contacted the manager and made arrangements with him to pursue your inspections, and then go [fol. 2708] on from there.

The Witness: Fine.

Q. So you made arrangements through the management to examine the shelves of the Ralph's store?

A. That is right.

Q. Did the manager accompany you in your rounds?

A. No, he did not.

Q. You went alone?

A. No, sir; another agent went with me.

Q. Now in your rounds, could you explain what you did?

A. Yes, sir. I had a piece of paper and I wrote down four headings, cans and glass, cans and plastic, glass and plastic, and all three, and I started up, started and walked up and down the aisles; looking at the products on the shelves, and wherever I noted any particular product packaged under those categories, I wrote the name down.

Q. You made no notation of the brand; is that correct?

A. No, sir.

Q. Or no notation if there was one or more brands?

A. No, sir.

Q. And you made no notation of the size or the cost of [fol. 2709] the item; is that correct?

A. I did not, sir.

By The Court:

Q. I wonder if you can tell us what standards you used to determine whether an item was the same product or not?

A. Well, the standard I used, sir, was this: I put myself in the position where if I was going into a store for a certain product, whether or not I would buy it.

Q. Well, for example—

A. In other words, for the same end use. That is—

Q. As you understood?

A. As I understood it, sir.

The Court: All right, go ahead.

By Mr. McManus:

Q. And you made notes as you went along and made your observations; is that correct?

A. Yes, sir.

By The Court:

Q. For instance, item 30 on Government's Exhibit 1178 is coffee: You made no distinction between instant coffee, that is, soluble coffee, or instant coffee, or so-called regular coffee, did you?

[fol. 2710] A. Well, sir, I distinctly remember coffee. There is coffee both in the cans and in the glass.

Q. Well, as I say, you didn't distinguish so-called instant coffee and the coffee that you put in the pot?

A. On that particular item I didn't take the instant coffee into consideration.

Q. You didn't take it into consideration?

A. No.

Mr. McManus: Excuse me. Could I have that answer?

(Answer read.)

By Mr. McManus:

Q. Did you happen to know if there was ground coffee in both?

A. Yes.

Q. There was ground coffee?

A. Yes.

Q. In both cans and glass?

A. There is regular coffee in—

Q. Cans?

A. —cans and glass, yes.

Q. Was there soluble coffee, to your knowledge, in both cans and glass?

[fol. 2711] A. What, instant?

Q. Yes.

A. I believe in instant there is only glass.

Q. Now going on to Government's Exhibit 1178, that is a compilation of your reports of all the products that you observed in particular type containers that are identified on that sheet; is that correct?

A. Yes, sir.

The Court: These are not broken down by individual stores?

The Witness: No, sir.

The Court: You have got food item—Esee.

The Witness: I didn't break them down into any categories. These are just the total items that I observed.

Q. Now, as I understand it, there is asparagus on that list; is that correct?

A. Yes, sir.

Q. So to identify what store or stores you observed the asparagus in cans and glass, you would have to refer back to the reports that you have, which are Court's Exhibits 8 and 9; is that correct?

A. That is correct.

Q. And although asparagus is listed once, you could only [fol. 2712] tell if it was found in more than one store by referring back to Court's Exhibits 8 and 9?—

A. That is correct.

Mr. McManus: Your Honor, we would now like to re-offer Government's Exhibit 1178 and Court's Exhibits 8 and 9.

The Court: Well, the first question I want to ask is, if you are offering 8 and 9, do you mean to include the accounts of the conversation between this witness and the various store managers?

Mr. McManus: We would be willing to strike any conversation between the store manager and the agent. The only purpose in offering Court's Exhibits 8 and 9 is in explanation of the Government's Exhibit 1178.

The Court: Well, that would mean in each one of these sheets, as far as I could see, and whether this is universal or not, I can't tell, with the exception of perhaps the last sentence in the first paragraph, all except the listing would be eliminated; is that correct?

Mr. McManus: Your Honor, we would offer only the identification of the store and the listing in Court's Exhibits 8 and 9. That would all, your Honor.

[fol. 2713] Mr. Hughes: Your Honor, may I say first, preliminary, I do have some questions, but if and when we get to the question of the admission of these, it seems to me that the exhibits should indicate the actual areas that are stricken from it and the government counsel, it seems to me, can take his pen or his pencil and do that—go through that process.

The Court: Well, I think that must be done. The portions of the exhibits that are not being offered should be physically stricken or indication made to that effect. That is a matter of mechanics. We will come to that in due course.

Now, is there anything further you have of this witness?

Mr. McManus: No, sir.

The Court: You have completed your offer. Mr. Hughes wishes to examine.

By Mr. Hughes:

Q. Mr. Hustedt, can you tell me about how much time you spent in each store in the course of this assignment?

A. Well, that varied from store to store, sir, and it would be impossible to give you a very accurate figure. I would say—

[fol. 2714] Q. Well, would you give me a maximum time and a minimal time?

A. Well, the maximum time, I would say, would be two hours and the minimum time would be 45 minutes.

Q. So there were some stores that you went through in 45 minutes?

A. Yes, sir.

Q. And how many would you say took about 45 minutes?

A. Oh, I would say—excuse me a minute—three.

Q. About three stores?

A. Yes.

Q. Where you took about 45 minutes?

A. Yes, sir.

Q. And could you identify those stores?

A. Yes. It would be the Charm Drug Company at 1602—

West 7th Street; Manray's at 3170 Wilshire Boulevard; and the D & B Pharmacy at 1100 South Vermont.

Q. And would you say that as to all of the others you spent approximately two hours?

A. No.

Q. There was a range, is that it, from the—
[fol. 2715] A. What?

Q. There was a range from a minimum of 45 minutes to a maximum of two hours; is that right?

A. Yes, sir.

Q. And could you give me an idea of the average time of a visit?

A. Oh—

Q. You can't? You can't give me an average?

A. It would be an educated guess.

Q. I don't want an educated guess.

Now, you started this assignment on August 29th, did you not?

A. Yes, sir.

Q. You completed the assignment on September 6th, so far as actual observations were concerned; is that not correct?

A. No, sir. September 2nd.

Q. September 2nd?

A. Yes, sir.

Q. So there was no observation by you or by anyone else on September 6th; is that correct?

A. That is correct, sir.

Q. And how many visits did you make altogether between August the 29th and September the 2nd?

[fol. 2716] A. Twenty stores.

Q. Twenty stores?

A. Yes, sir.

Q. Now, on August the 30th, you visited eight stores, did you not?

A. On August the 30th.

Q. On August the 30th. If it will help you I will refer to the stores that I have—

A. Well, I have them right here in a row. I will count them back. Eight stores, that is correct sir.

Q. And those stores were in the heart of the City of Los Angeles, were they not?

Mr. McManus: Your Honor, I would like to object to the form of that. Knowing a little about Los Angeles, I would like a little more definition about what the heart of Los Angeles is.

The Court: You mean Los Angeles has no heart?

Mr. McManus: That is actually my theory, your Honor: there is no heart of Los Angeles. It covers about 50 or 100 miles in every direction.

Q. I will withdraw the question. All of them were within the city limits of Los Angeles; is that right?

[fol. 2717] A. Yes, sir.

Q. Some of them as much as five miles apart; is that not right?

A. Yes, sir.

Q. And spread out over an area of maybe as much as six or seven square miles; is that right?

A. I would say the two—that's right.

Q. And probably a good deal more than that?

A. No, sir.

Q. Six or seven is about right?

A. Right.

Q. Now, will you tell his Honor how much time you spent in each of these stores?

A. I didn't keep time, Mr. Hughes. All I can say is that from 45 minutes to two hours; enough time for me to walk around the store and look at all the products.

Q. Are you saying that you can't estimate for his Honor about how much time you spent in each of these stores?

The Court: When you say "these," are you referring to the August 30th stores?

Mr. Hughes: I am referring to the August 30th stores. [fol. 2718] yes, sir.

A. The best answer I can give is the time it took me to walk around the stores, and this time, it was 45 minutes—

Q. How did you go from store to store?

A. By car.

Q. By car. And would you say that you examined or observed thousands of items in each of these stores?

A. Individual items?

Q. Yes.

A. By just taking—yes. I would say yes.

Q. In each one of them; right? In each one of these stores you observed thousands of items; right?

A. Yes.

Q. And you would characterize these as large stores, would you not?

A. Yes.

Q. Now, was Mr. Kerley with you when you visited these eight stores?

A. On the 30th?

Q. Don't you remember that?

The Court: No. He asked you whether you were referring to the 30th.

[fol. 2719] Mr. Hughes: Yes, sir.

Q. I am asking you, can you recall to me now, without recourse to any paper or writing of any kind, whether Mr. Kerley was with you when you visited each one of those eight stores?

A. I would say yes.

Q. And what did he do?

A. We walked together looking for the items, checking the items.

Q. So, as I understand it, Mr. Kerley's sole function was to accompany you to each one of these stores and to walk with you as you walked through these stores; is that what you are telling his Honor?

A. That's what he did.

Q. Isn't it a fact, Mr. Hustedt, that in some of these stores you divided the labor and that you took part of the store and that he took part of the store?

A. That is not right.

Q. So you brought him along and he went through these eight stores more or less as a passenger; is that right?

A. Well, I wouldn't use that terminology.

Q. What did he do?

A. He assisted me in looking at the products.

[fol. 2720] Q. What did he do?

A. Well, the best way to explain it is this: While walking down an aisle—I can't say exactly how many products are on the shelves, but walking down the shelf of the super—an aisle of the supermarkets, you can see whether one

shelf is all cans and if there are any bottles on it, or if —what type of packages are on the shelves; and we would walk along and, if we saw something that wasn't a can, we would stop and examine it to determine what it was; and you could look at a thousand—some shelves are all cans and some are all paper packages, like breads and things like that. You can observe an awful lot of products on a shelf and get an idea of what they are packaged in.

Q. I want to be sure of this. Is that your explanation to his Honor of the function that Mr. Kerley performed on that day in those eight stores?

A. Mr. Kerley was with me at all times, that's right.

Q. Have you got anything more to add to your explanation of what he did?

A. Well, Mr. Hughes, Mr. Kerley was with me for this reason; we started out and we determined that by walking [fol. 2721] down the aisle together and observing the products—there are two sides of an aisle—by walking down together, we could spot where there were items that we were interested in locating, and we could check them.

Q. And he was doing some of the spotting and you were doing some of the spotting; is that right?

A. That's right. And when he would find an item that we were interested in, he would call it to my attention.

Q. Now, you were pretty busy that day, weren't you?

A. Yes, sir.

Q. How long were you at it?

A. All day.

Q. How long is all day?

A. About 8 in the morning until about 6 at night.

Q. Going through the stores, and then going from store to store; right?

A. Yes, sir.

Q. Now, you made 20 visits to stores altogether, you have told me; is that correct?

A. Yes, sir.

Q. Would it be correct to say that Mr. Kerley accompanied you on 15 of these visits?

A. I would have to check it. I don't—I know one day he did not accompany me. Do you want me to check it.

Q. Do you have to look at records in order to check that?

A. Yes, sir.

Q. And isn't it a fact that as you sit there on that witness stand now, it is literally impossible for you to tell his Honor any product you saw in any particular store during the period from August 29th to September 2nd?

A. From my recollection?

Q. Yes.

A. That's right. But I have my original notes here that will assist me.

Mr. Hughes: I move to strike the balance of that answer.

The Court: I will let it stand.

By Mr. Hughes:

Q. Now, on September 2nd, how many stores did you visit?

A. I count four.

Q. Four on September the 2nd; right?

[fol. 2723] A. Yes, sir.

Q. Was Mr. Kerley with you that day?

A. Yes, sir.

Q. And were they all within the city limits of Los Angeles?

A. Yes, sir.

Q. And were they scattered around?

A. I would say they were over a six-mile area, too, approximately.

Mr. Hughes: Your Honor, I object to the admission of any of these documents on the ground that no proper foundation for their reception has been shown or indicated, and I urge the same objections that I interposed to the other exhibits of this similar character.

The Court: The objection is overruled. I make the same ruling with respect to these that he made with respect to the previous exhibits.

○ As far as Court's Exhibits 8 and 9 are concerned, they, of course, will be admitted, with the matter that we previously discussed stricken from them.

Mr. McManus: Yes, your Honor.

The Court: That will be physically stricken from the exhibit.

[fol. 2724] Mr. McManus: Yes, sir.

That is all, Mr. Hustedt.

Mr. Hughes: I have some more.

The Court: All right.

(Court's Exhibits 8 and 9 for identification received in evidence and market Government's Exhibit's G-1178A and G1178B.)

Cross-examination.

By Mr. Hughes:

Q. One of the things you were told to look for were articles in glass and plastic containers; is that right?

A. Yes.

Q. And what do you consider to be embraced within the term "containers made of plastic"?

A. I would say plastic.

Q. I didn't catch that answer.

A. I say I can't give you the definition of plastic. I understand it's plastic if—

Q. Would you say anything made of plastic that would contain things would be a plastic container?

A. If it was a container, yes, sir.

Q. Well, anything that was made of plastic, designed to contain things you would consider to be a plastic container; is that right?

[fol. 2725] A. That is right.

Q. And you were asked to look for articles that were packaged in containers made of tin; is that right?

A. Yes, sir.

Q. And what would you include in that definition?

A. Well, I included in that definition cans, and I also heard this question here—I also included these tubes.

Q. Toothpaste tubes—

A. Toothpaste and—

Q. Did you include pails?

A. Pails?

Q. Pails.

A. I don't understand that.

Q. Well, do you consider pails to be within the definition of the kind of thing you were looking for?

The Court: Did you find any pails?

The Witness: I don't recall any.

By Mr. Hughes:

Q. Now, as you made these observations, did you take note of the fact that many of the containers had labels on them? I am referring more particularly to the cans.

A. Yes, sir.

[fol. 2726] The Court: Well, they all had labels on them, didn't they?

The Witness: Yes, sir. That's how I identified the products.

Mr. Hughes: Well, your Honor, I am distinguishing between an actual wrap-around label on the can, and there were some cans, I suppose, that had the brand and other data just lithographed on them.

By Mr. Hughes:

Q. Is that right?

A. Just what, sir?

Q. Had the brand and other data lithographed on them.

The Court: You mean as distinguished from something made of paper and wrapped around the can?

Mr. Hughes: Yes, sir, that's the distinction.

A. I can't recall that, sir.

Q. Well, in any event, you do recall that many of the cans did have these paper labels on them; is that right?

A. Yes, sir.

Q. Now, in the course of your observations—that's all you really did, was merely to observe, isn't that right?

[fol. 2727] A. That's right.

Q. You did not pick these articles up and finger them or something of that sort?

A. Some of the plastic items we did.

Q. The plastic items you did?

A. Yes, sir.

Q. But none of the other items; is that right?

A. Well, when there was a question in my mind about what the product was made of, to my best recollection, that's the only time I picked them up and handled them.

Q. You did not do much handling of the products, did you?

A. No.

Q. You were too busy getting on with the job to take the time to pick these up and look them over; isn't that a fair statement?

A. No, that's not a fair statement.

Q. About how many would you say you examined?

A. I couldn't say at this time.

Q. Many? Many in relation to the entire number you saw?

A. No.

[fol. 2728] Q. Now, do you know what a fiber can is?

A. No.

Q. And have you ever seen cans that have a fiber body and have a metal top and a metal bottom? Have you ever seen any such cans as that?

A. Oh, I think—

Q. I say, have you ever seen any such cans as that anywhere, at any time?

The Court: He is about to tell us.

A. It wouldn't be a can if it was fiber, would it?

Q. You would say it wouldn't be a can if it was fiber?

A. No, I wouldn't. I wouldn't call it a can.

Q. Was one of the products that you observed Serutan?

The Court: You may refer to your list.

A. Yes.

Q. According to your observation, that was in cans and glass containers; is that right?

A. That's right.

Q. And as far as you were concerned, that was a metal can; is that right?

[fol. 2729] The Court: Well, now, wait a minute. You say the can was a metal can?

Mr. Hughes: I say as far as he was concerned, he regarded that as a metal can.

By Mr. Hughes:

Q. Is that right?

A. Well, I put it down, so some place I must have seen something that I considered a can, yes, sir.

Q. Does this look like what you saw, do you remember?

A. I can't say if that is what I saw. It's—

Q. I say, does it look like what you saw?

A. I can't remember distinctly seeing this product.

Q. That is, you have no recollection of seeing anything; is that right?

A. Well, not—

Q. Can you describe to us what you saw and noted as a can of Serutan?

A. I can't recall distinctly seeing Serutan.

Q. So you have no recollection on the subject at all and cannot describe for his Honor the kind of container it was that you put on your list as a can of Serutan?

[fol. 2730] A. That's right.

Mr. Hughes: I ask that the container that I showed the witness be marked for identification.

(Defendant's Exhibit T marked for identification.)

The Court: Have you anything further, Mr. Hughes?

Mr. Hughes: I may have, your Honor. I am just looking to see.

By Mr. Hughes:

Q. One of the things that you observed was french fried ants, french fried butterflies and french fried grasshoppers, do you remember that?

A. Yes, sir.

Q. Do you remember whether they were domestically packed?

A. They were imported.

Q. Were any other items that you observed imported?

A. I don't know, sir. The only reason I know they were imported, they were such a different item that we looked where they were manufactured.

Q. But as to all the other items, you couldn't tell us whether they were domestically packed or imported; is [fol. 2730a] that right?

A. No, sir.

[fol. 2731] Q. You, in your observations, indicated that you saw an item which you described as cherries; is that right?

A. Yes, sir.

Q. And did you include in that item maraschino cherries?

A. I didn't make any breakdown of cherries. I didn't go as far as types or—

Q. And another item you had was patent medicines; do you remember that?

A. Yes, sir.

Q. You made no attempt to break that item down, did you?

A. No, sir; it was too numerous.

Q. Did you notice that with respect to patent medicines, many of them came with an outer container?

A. Well, sir, I didn't go inside the outside container.

Q. And did you notice that some of these patent medicines were in these folding paper boxes, as they stood in the shelves?

A. Do you mean the boxes where the individual packages are shipped or displayed?

Q. Yes.

[fol. 2732] A. Yes, sir.

Q. And was that not also true of many of the cosmetics and toiletry items that you observed, there was an outer paper or cardboard container?

A. Well, I think we are talking about two different outside packages now. Now, when we are talking about the patent medicines, the outside cartons used for display purposes, and these cosmetics, I just looked in the show-cases and on the shelves and I didn't—

Q. Did you notice that any of the things that you looked at were in paper cartons or little paper boxes?

A. Sir, the items that I saw were exposed to me, because I don't ever remember going into any package to determine what the inside package was made of.

The Court: In other words, if you saw something that appeared to be a bottle of patent medicine with a carton around it, you didn't go any farther?

The Witness: No.

Mr. Hughes: That is all, your Honor.

The Court: All right, let me have that exhibit, please.

Let me ask you—

[fol. 2733] Mr. McManus: Is the Serutan being offered?

The Court: Now I show you Exhibit T and ask you if you would consider that a can or not?

The Witness: I would have to say I would consider that a can, your Honor.

The Court: You would consider it a can.

Mr. Hughes: I offer it in evidence.

The Court: All right.

Mr. McManus: Your Honor, I would like one question: where was that obtained? I would like to know where it was obtained?

The Court: Where the Serutan was obtained?

Mr. McManus: Where that particular can was obtained?

The Court: Will you tell us that?

Mr. Kuhn: That was obtained in the Rexall Drug Store on 42nd and Grand Central.

The Court: You bought it?

Mr. Kuhn: I did.

The Court: Very good.

Redirect examination.

By Mr. McManus:

Q. Would you consider that a metal can?

A. Pardon?

Q. Would you consider that a metal can, Mr. Hustedt?
[fol. 2734] A. Yes.

The Court: Incidentally, on your offer, the can will be received.

Mr. Hughes: Yes.

(Defendant's Exhibit T received in evidence.)

Q. Now, Mr. Hustedt, we are talking about plastic containers; are you familiar with cellophane?

A. Yes.

Q. Were any of the products on your list, that you listed as plastic containers, packed in cellophane?

A. No, sir.

Q. Or any films of that type?

Mr. Hughes: May I have that last question and answer, please?

The Court: Let's make it "or any wrapping."

Mr. Hughes: But may I still have the question and answer?

The Court: All right.

(Record read.)

Q. Or do you recall one way or the other?

A. Well, anything I considered cellophane I didn't include.

Q. Now, you said that on your list you had included metal [fol. 2735] tubes; do you recall how many of the products on your list were packaged in metal tubes?

A. Toothpaste and glue.

Q. Were there any others?

A. Not to my knowledge.

Q. Were either one of those products packaged in the more conventional metal can, to your knowledge?

A. I remember toothpaste was.

Q. Was it the glue?

A. I can't remember that.

Mr. McManus: That is all I have.

The Court: All right, anything further?

Mr. Hughes: Just one or two questions.

Recross-examination.

By Mr. Hughes:

Q. Do you know the difference, or can you by observation tell the difference between cellophane wrapping and other types of transparent wrapping?

A. Well, from my observation I would consider any wrapping that is thin in nature and—

The Court: Transparent?

The Witness: Not necessarily transparent, but has no rigidity.

The Court: Flexible?

The Witness: Flexible, I would call that cellophane.

[fols. 2736-2739]. Q. In other words, as far as you were concerned, that is a name or a word that embraces all flexible packaging; is that right?

A. Oh, no.

The Court: Now we are getting a little complicated, Mr. Hughes.

Mr. Hughes: All right, I withdraw that.

The Court: You mean any type of wrapping that is like—

The Witness: Cellophane.

The Court: —looks like cellophane, you consider to be cellophane; is that what you are trying to say?

The Witness: That's right, your Honor.

The Court: All right, you may step down, Mr. Hustedt. Thank you.

(Witnessed excused.)

[fol. 2740] JOSEPH H. SERVEL, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Where do you reside?

By The Court:

Q. Are you with the Chicago FBI?

A. Yes, sir; your Honor.

Q. You work out of that field office?

A. Yes, your Honor.

Q. Did you make various inspections of grocery stores and other stores under directions received from the department of justice?

A. Yes, your Honor.

Q. When did you do it?

A. Between August 30th, I believe it was, and the first part of September of this year.

Q. Did you prepare lists of what you saw?

A. Yes, your Honor.

Q. Where are they?

Mr. Greenberg: Just a moment.

We have marked them as Government's Exhibits 1179 [fol. 2741] through 1186 for identification.

The Court: Those are all from this witness?

Mr. Greenberg: That is correct, your Honor.

By The Court:

Q. Tell us in very brief compass precisely what you did in these stores?

A. I went to the store, introduced myself to the store manager as an agent.

Q. All right, you went in the stores and you looked.

A. Right. I examined the products on the shelves.

Q. You went and examined products on the shelves.

A. And made a list.

Q. You made a list?

A. Yes.

Q. And that list included in the documents before you the various stores?

A. Yes, your Honor.

Q. How many stores?

A. I went to eight stores altogether.

Q. Eight stores. What kind of stores?

A. Five independent groceries, one drug—one department store and two drug stores.

[fol. 2742] Q. What were you looking for?

A. I was looking on the shelves to find items that were packaged in cans and glass, or cans, glass or plastics, or glass and plastic.

Q. All right, and those documents you hold in your hand, which are exhibit numbers to which Mr. Greenberg has referred, are the lists that were made up of the items you observed; is that right?

A. Yes, your Honor.

The Court: You offer them in evidence?

Mr. Greenberg: I offer them into evidence.

The Court: You may examine, Mr. Hughes.

Mr. Greenberg: Before Mr. Hughes examines, I would like to thank the Court very humbly for carrying the burden of the questioning.

Mr. Hughes: Your Honor, I have no examination on the voir dire, if that is the correct expression.

The Court: Yes.

Mr. Hughes: So I object to each of these on the same grounds previously urged to similar reports of this character, and I particularly note certain hearsay data that appears.

The Court: Well, should the hearsay data be eliminated? [fol. 2743] Mr. Greenberg: Your Honor, we have agreed to eliminate it, but just as an offhand comment; it would seem to be part of the res gestae, and if your Honor rejects that document, then I suppose—

The Court: We will cut out the hearsay, res gestae or no, and you gentlemen will arrange to strike that matter physically from the exhibits in due course.

I will admit them upon the same conditions and make the same ruling as with respect to the previous matter, exhibits of this nature.

Now, do you have some questions?

Mr. Hughes: I have a few questions.

The Court: Very good.

(Government's Exhibits 1179 through 1186 received in evidence.)

Cross-examination.

By Mr. Hughes:

Q. Exhibit G-1179, have you got that in front of you?

A. The ones I have are not marked.

Q. In any event, one of the places you went to is the Epicure Shop of Carson, Pirie & Scott; is that right?

A. That's right.

[fol. 2744] Q. And Carson, Pirie & Scott is a large department store?

A. That is correct.

Q. And would you say that the Epicure Shop of that store featured what I would describe as fancy products?

A. That is correct.

Mr. Greenberg: If the Court please, Mr. Hughes said "What I would describe as fancy products." May we have a definition for the record?

The Court: All right, tell us what you mean by "fancy products"?

Q. Mr. Witness, do you think you understood me when I said that it was a store that featured fancy products? Did that conjure up something in your mind?

A. Yes, it did.

The Court: Would you say that "fancy products" were products for epicures or gourmets?

The Witness: Well, as it happens, in this particular department they wouldn't be restricted to the epicure or gourmet, I don't believe.

Q. Rather fancy on the price, too, wouldn't you say?

Mr. Greenberg: I object to that, your Honor.

[fol. 2745] The Court: Prices were rather higher than the ordinary grocery store; is that right?

The Witness: In most instances.

The Court: In most instances.

Mr. Greenberg: If the Court please, I would like to point out for the record that Mr. Hughes stipulated and we stipulated with him that the agents didn't look at the prices.

Mr. Hughes: I quite agree to that.

Mr. Greenberg: Then you withdraw your question?

Mr. Hughes: No.

Mr. Greenberg: Oh.

The Court: Very good. Anything further?

Mr. Hughes: Just a second.

Q. What is your definition of a container made of plastic?

A. Well, to define a container made of plastic, I would have to say that my definition, as I was preparing this list, arrived at the fact that it was plastic container by examining it. In most instances I would squeeze it or pick it up or look at it and determined it was plastic.

The Court: If it looked like plastic to you, you said it [fol. 2746] was plastic?

The Witness: And it felt like plastic, then I called it plastic.

Q. Did it include tubes, such as the Prell tube you saw here in the court the other day?

A. Not in most instances, no.

Q. No, I say, do you consider that to fall within your definition of a plastic container?

A. I believe that is plastic, yes, but I was more—a better illustration would be one that the liquid detergent comes in.

Q. But if you saw something like that Prell, you would have regarded that as a plastic container; is that right?

A. Yes.

Q. And would you regard these toothpaste tubes as metal containers?

A. No.

Q. What would you consider to be a metal container?

A. Tin can, tin, actually metal, the whole thing, top and bottom and sides.

Mr. Hughes: That is all.

The Court: All right, thank you, Mr. Servel.

(Witness excused.)

[fol. 2747] Mr. Greenberg: Government calls Mr. Alton E. Bramblett to the stand.

ALTON E. BRAMBLETT, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Where do you reside, sir?

A. Chicago, Illinois.

Q. Did you hear the questions propounded by his Honor to Mr. Servel?

A. Yes, sir.

Q. Would your answers to those questions be the same?

A. Yes, sir.

Mr. Greenberg: You may cross-examine.

The Court: What exhibits—

Mr. Greenberg: Oh, excuse me, your Honor.

These are Exhibits G-1187 through G-1190. Government offers those exhibits into evidence.

The Court: Show them to the witness and ask him if those are the lists he made.

By Mr. Greenberg:

Q. Would you tell us what these are?
[fol. 2747a] A. These are the lists that I prepared after contacting these various stores and obtaining information regarding the containers that these items were contained in, whether they were contained in a plastic container, glass container or a tin container.

The Court: All right, you offer them?

Mr. Greenberg: I offer them, your Honor.

[fol. 2748] Mr. Hughes: Will you return G-1187, please.

The Court: May I have copies of them from which I can follow?

Mr. Greenberg: Your Honor, I will hand up the Government exhibits to you, and I wonder if Mr. Hughes might indicate what report he is talking about, so the agent can identify it.

Mr. Hughes: Musket and Hendricksen.

The Witness: Yes, sir.

By Mr. Hughes:

Q. In the case of that store, Mr. Bramblett, isn't it a fact that the list of products was furnished to you by Mr. Madez?

A. No, sir.

Q. Well, I show you Exhibit G-1187 and I ask you to read the opening part of it and, having done so, I would like to ask you a question.

Mr. Greenberg: Did you identify it?

Mr. Hughes: Yes.

A. Yes, sir.

Q. You say, having read that opening paragraph, that Mr. Madez did not furnish the list?

A. Mr. Madez accompanied me on the tour of the store.
[fol. 2749] Q. But you state that Mr. Madez furnished a list, don't you?

A. Yes, sir.

Q. And you do recall that there were, in some of the other visits to other stores that have not been referred to here—that the list was furnished to you; don't you recall that?

A. Yes, sir.

Q. And wasn't this the same as the other stores as to which the Government is not offering proof?

A. No, sir.

Q. So that you say that the statement in G-1187, your report of what happened, is incorrect?

A. The word "furnished" would be incorrect.

Q. You say that is a mistake?

A. He accompanied me on a tour of the store.

Q. So you say the word "furnished" is incorrect?

A. Yes, sir.

The Court. Except in the sense that he pointed out items on the shelves; is that right?

The Witness: Yes, sir.

By Mr. Hughes:

Q. On the same exhibit is an item "Ointments, First [fol. 2750] Aid"; do you see that?

A. Yes, sir.

Q. Can you tell me what kind of products were embraced in that item?

A. I don't recall the brand names of the products, no, sir.

Q. Do you recall the kind of products they were?

A. No, sir.

Q. Were any of them in plastic tubes?

A. I beg your pardon?

Q. Were any of those ointments in plastic tubes?

A. Yes, sir. I would think so. I would consider a plastic tube to be plastic.

Q. Were any of them in metal tubes?

A. No, sir, I didn't consider a metal tube as being a metal container.

Q. Will you turn to G-1190. Do you see that Exhibit G-1190?

A. Mine are unmarked.

The Court: That is Goldblatt Bros.

Q. Goldblatt Bros.

A. Yes, sir.

Q. Will you tell me how many items were embraced within the list of products shown?

[fol. 2751] A. Now, I have two, Mr. Lipinski and Mr. Pernicky. Which one are you referring to.

Q. Mr. Lipinski's.

A. I don't quite understand your question, sir.

Q. I say, can you tell me how many items were embraced within these six descriptive designations that you have made on this?

A. No, sir, I couldn't.

Q. I say, can you tell me how many?

A. No, sir.

Q. You haven't any idea? Is it a big store?

A. Yes, sir.

Q. And do you recall that there were a very large number of items?

A. No, sir, not a large number.

Mr. Hughes: That's all.

The Court: All right. You make the same objection to these, I take it, Mr. Hughes?

Mr. Hughes: I thought I had. In any event, I do make it.

The Court: Yes. I think again we have some material here that is in the nature of hearsay that will be physically stricken, the lists themselves will be admitted. I am making the same ruling in all respects, as I did with respect to the [fol. 2752] previous documents of this nature.

Mr. McManus: Yes, sir.

The Court: Anything further from Mr. Bramblett?

Mr. McManus: No, your Honor.

(Witnessed excused.)

(Government's Exhibits G-1187 through G-1190 for identification received in evidence.)

GINO L. LAZZARI, called as a witness by the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lazzari:

Q. Mr. Lazzari, did you hear his Honor's questions to Mr. Servell?

A. I did.

Q. And would your answers to those questions be the same?

A. Yes, they would.

Q. I now show you Government's Exhibits 1191 through 1199 which have been marked for identification and I ask you what they are.

A. These are lists compiled by me as a result of an [fol. 2753] investigation in this matter conducted by myself.

Q. And do they reflect what you observed in each of the stores indicated?

A. That's right. They reflect my observations regarding certain of the products that were packaged in two or more of the following containers: that is, tin, glass or plastic.

Q. Have you completed your answer?

A. Yes, sir.

Mr. Greenberg: Government offers these exhibits into evidence.

Mr. Hughes: Same objection on the same grounds.

The Court: Same ruling.

(Government's Exhibits G-1191 through G-1199 for identification received in evidence.)

Mr. Hughes: May I have G-1191?

Cross-examination

By Mr. Hughes:

Q. That is the food division of Marshall Field, Mr. Lazzari.

A. All right.

Q. Mr. Lazzari, did you note that most of the foods in this department were imported?

[fol. 2754] A. That's correct, sir; but the items listed here—

Q. Not—

Mr. Greenberg: Your Honor, the witness was trying to complete his answer.

The Court: Yes. Go ahead.

A. The items listed here were packaged within the United States. They are not imported.

Q. I beg your pardon?

A. The items listed here were packaged in the United States; not imported items.

Q. That is, caviar was packaged in the United States?

A. According to what Mr. Smith pointed out, yes, sir.

Q. How many items would you say were in that store altogether?

A. I couldn't give a—

Mr. Greenberg: Does he mean the store or the department?

The Court: He is talking about the department.

Q. This department.

A. I couldn't give an accurate estimate.

[fol. 2755] The Court: Would it be hundreds?

The Witness: Hundreds, yes, sir.

The Court: Would there be thousands?

The Witness: I would not say thousands, no sir.

By Mr. Hughes:

Q. And would you say that this was of the gourmet type of store—borrowing an expression used here?

A. Yes. It is a little above the regular food chain store.

Q. Now, 1192, which is Marshall Field's houseware de-

partment, do you see your description of the housewares there?

A. Yes.

Q. How many items were embraced within those six categories? Can you give us any idea?

A. Well, by product, I would say approximately 100.

Q. A hundred. How big a department is that houseware department?

A. Well, in my opinion it wasn't too large. I think it would be on the Marshall Field catering—they just maintain it.

[fol. 2756] The Court: Was it as large, for instance, as the food division?

The Witness: No, sir.

Mr. Hughes: Your Honor, in passing, I assume what we have been describing here as the hearsay—

The Court: All of these exhibits, material that is hearsay, and plainly recognizable as such, will be physically eliminated, or at least stricken out.

By Mr. Hughes:

Q. Now, will you look at G-1197. That is Atlantic & Pacific Company.

A. Right.

Q. Do you see that?

A. Yes.

Q. You were accompanied by Mr. Stahl on that observation?

A. Yes, sir, I was.

Q. Did you split the job?

A. No, sir.

Q. That is, you both went down the aisles together?

A. He accompanied me while I prepared my list.

Q. What did he do?

[fol. 2757] A. He accompanied me down the aisle and, as we came across a different—a certain product that was packaged in both tin and glass or glass and plastic, he would point them out as we went down and I would make a note of it.

Q. On Exhibit G-1197, which is the A & P, can you tell

me what items were embraced within your description "Fish"?

A. I would think from recollection that that would be the anchovy and small fish of that type. I also think—

The Court: Would you include tuna fish and salmon?

The Witness: Yes, sir.

Q. And can you think of anything else that was included? In other words, what did you see and observe—

A. Tuna fish, salmon, herring, just about anything—

By the Court:

Q. Shrimp?

A. Shrimp, yes, sir.

Q. Canned oysters?

A. Canned oysters, clams; sea foods.

[fol. 2758] Q. Can you tell us, for example, whether tuna fish was packed in both tin and glass?

A. I would say that I have seen it in tin. I know I have seen it in tin. In glass, I think it is in the tuna-noodle affair.

Q. But not tuna fish by itself, as far as you know?

A. I couldn't accurately say.

Q. What about salmon?

A. I couldn't accurately say, but, as indicated here, I evidently saw some sort of fish in glass; but the majority of the tin were salmon—

Q. You don't know, as far as salmon goes, whether salmon was packed in tin, glass or both; you know it was packed in tin?

A. Yes, sir.

Q. But you don't know whether it was packed in glass?

A. No, I couldn't say.

The Court: All right.

Mr. Hughes: That's all, your Honor.

The Court: All right.

I take it, Mr. Hughes, you make the same objection?

[fol. 2759] Mr. Hughes: Yes, sir.

The Court: Same ruling.

(Witness excused.)

FREDERICK F. STAHL, called as a witness by the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Mr. Stahl, where you in the courtroom when his Honor propounded questions to Mr. Serve?

A. Yes.

Q. And did you hear the answers?

A. Yes.

Q. And would your answers be the same to those questions?

A. Yes, sir.

Q. I show you Government's Exhibits 1200 and 1201 and ask you what they are?

A. These are the lists of products that were packaged in two or more containers made of tin, glass or plastics. The lists were obtained from the Jewel Tea Company and the National Tea Company located in Chicago.

Q. Did you observe the product listed on these exhibits [fols. 2760-2761]?

A. Yes, I did.

Q. Your answer is?

A. Yes.

Mr. Greenberg: Government offers G-1200 and G-1201 into evidence.

Mr. Hughes: Same objection.

The Court: Same rulings.

Have you any questions of the witness?

Mr. Hughes: No questions.

The Court: Very good.

Thank you, Mr. Stahl, you may step down.

(Witness excused.)

(Government's Exhibits 1200 and 1201 for identification received in evidence.)

[fol. 2762] LEO V. FINN, called as a witness on behalf of the Government; having been duly sworn, testified as follows:

Direct examination.

By Mr. McManus:

Q. Mr. Finn, by whom are you employed?

A. I am employed by the Antitrust Division, Department of Justice.

Q. And how long a period have you been employed by the Division?

A. I have been in the Division 22 years.

Q. And what is your title in the Division?

A. My present title is business economist.

Q. Do you hold any major degree in economics?

A. No, I do not.

Q. Could you tell me, is your background more of an accounting or statistical background?

A. Well, I have a degree in accountancy.

Mr. Hughes: Will your Honor ask the witness to keep [fol. 2763] his voice up?

The Court: Try and keep your voice up.

A. (Continuing) I have a degree in accountancy.

Q. But you have no major degree in economics?

A. No, I do not.

Mr. McManus: Your Honor, as a matter of procedure at this point, I would like, if possible, if I could show the witness folder A, which is 801, and go through folder A, and then if the defendants would like to examine on folder A, then to folder B and folder C.

Is that satisfactory?

Mr. Johnson: I have a suggestion in this connection that I think will facilitate the handling of these.

My understanding is that the Government proposes to offer three books of statistics through Mr. Finn; is that correct?

Mr. McManus: That is correct; 801, 802 and 803.

Mr. Johnson: And an additional book on Mr. Tolton.

Now, these books are interrelated, many of the charts and tables are interrelated, and many of the questions [fol. 2764] that I have, I believe, are related to either or both.

The suggestion I would like to make is that the Government offer all of their material on Mr. Finn, then offer whatever they have to offer on Mr. Tolton, and the offer be reserved, ruling on the offer be reserved, until such time as I subsequently get a chance to examine Mr. Finn and Mr. Tolton in turn. In other words, I would suggest that they complete the direct on Mr. Finn, then complete the direct on Mr. Tolton, then call Mr. Finn back for cross, and the same for Mr. Tolton.

Now, unless we can do something like—I'm afraid it would be almost impossible to follow this.

Mr. McManus: Your Honor, the only problem I have is this: our direct is going to be necessarily very short, because as I was starting to bring out with Mr. Finn, Mr. Finn is not on the stand as an economist. Mr. Finn took—

The Court: Mr. Finn has done certain things with certain figures; is that right?

Mr. McManus: That is correct.

The Witness: That's right.

Mr. McManus: And he has taken the basic data, all of [fol. 2765] which we have furnished to the defendants, with the exception of the American National Can statistics, and he has compiled them into tables. Mr. Tolton did the same thing, only he can put them into chart form, some of the basic data being different.

My understanding is that, as we discussed the other day, it was not necessary for the Government to bring witnesses as to the underlying data at this time.

The Court: That's right.

Mr. McManus: So to expedite matters, if possible, I have no objection to the procedure if we could go ahead and have Mr. Finn explain what he did on the charts.

The Court: Oh, I see no reason why Mr. Finn should not explain what he did with respect to each of these three booklets.

Mr. McManus: I see.

The Court: And then I think I would be inclined to go along with Mr. Johnson's suggestion, that we then have the chart man testify as to what he did with respect to the charts. Then I will have a complete picture of what you propose to present. You will have made your offer, and then Mr. Johnson can go ahead with his cross-examination. [fol. 2766]

Mr. McManus: That is very fine, your Honor, if we can agree to that.

The Court: All right.

Mr. McManus: So that, if we may, your Honor, we all have copies of 801, 802 and 803, and I can see no purpose in my asking Mr. Finn directly about it if he could explain to your Honor and to the defendants what he has done on each chart.

Is that satisfactory?

The Court: I think that is the thing to do, unless—let me ask you this, Mr. Johnson: Are you questioning Mr. Finn's qualifications to put together data? I take it not.

Mr. Johnson: I will have questions with respect to his qualifications, but they are not going to the question of qualification to put together any particular paper.

The Court: I see. Well, the only point is at this point Mr. McManus is attempting to qualify the gentleman as a witness, as an expert witness, with expertise, if I may use that word, in his field of putting figures together. Now do you question his qualification on that score?

[fol. 2767] Mr. Johnson: We get the problem that we have had a number of times here, that questions on voir dire as inextricably mixed up with questions on the examination.

The Court: Well, I just don't want Mr. McManus to be placed in a position where he has not laid sufficient background as to the qualification of this gentleman, so that you are going to make a motion on the ground that he is unqualified, to the embarrassment of Mr. McManus.

Mr. Johnson: No, sir; I did not have that in mind.

The Court: All right, that is all I wanted to know.

Mr. McManus: All right.

The Court: Whatever you have to do will go to the weight.

of this and its admissibility, not to the question of whether he is at all qualified to testify on the subject.

Mr. Johnson: That is correct.

The Court: Very good.

[fol. 2768] Q. So, Mr. Finn, if you would just start with the first chart in folder A, which I believe is on page 3—

The Court: I take it this starts, now, with an index; does it?

Mr. McManus: Yes, your Honor, page 1 being an index, page 2 being section 1 of folder A, and then every page has a number at the bottom, and if Mr. Finn, before he explains a chart, will say what page he is on, I think we can all follow very clearly.

The Court: Are we referring now to Exhibit 801?

Mr. McManus: Yes, sir, 801, page 3, which is the first table in the book.

A. Well, on folder A, we have divided this folder into three sections. Section 1 has to do with the continental United States shipments of glass containers for 1955, '56 and '57.

The Court: When you said "continental United States shipments," do you mean shipments by Continental—

The Witness: No.

The Court: Oh, you meant shipment within the continental United States?

The Witness: That's right.

A. (Continuing) And section 2, we have the continental United States shipments for metal containers; and in the third section, we combine glass and metal containers for the Continental United States shipments for 1955, '56 and '57.

Now, on page 3, this tabulation shows the continental United States shipments for all types of glass containers for 1955, '56 and '57, compared with the leading manufacturers in the industry.

The Court: It seems to me that one of the important questions is, where did the figures which go into this schedule come from and how was the schedule made up?

The Witness: Yes, sir. At the bottom of this page, on page 3, we give a source. It says, "U. S. totals are from the Bureau of the Census, Facts for Industry, Glass Container Summary, Series M32G." Company totals are from the Glass Container Manufacturers Institute, Inc.

Now, the——

The Court: Tell us, when you say the Bureau of the Census, where in the Bureau of the Census, from what [fol. 2770] census sources you refer to here?

The Witness: Well, the Bureau of the Census monthly publishes a series which is entitled "Facts for Industry," and in——

The Court: I think, Mr. Finn, if I may interpolate, two people have to understand this. No doubt the basic material with respect to this, or at least a substantial part of it, has been given to the defendants. I have seen no basic material. This is the first time I have seen this chart.

What the government's burden is, in order to put this chart into evidence, is to convince me that this chart or schedule is an accurate schedule of what it purports to portray, and your testimony on the subject should be directed to giving me such information as enables me to determine that fact.

The Witness: The Bureau of the Census monthly issues a monthly publication, and they also have a summary at the end of a year, showing the production and the shipment of glass containers by various end-use categories. This information is obtained by Census from all of the manufacturers of glass containers in the United States.

The Court: Under the so-called confidential type of census reports, is that right?

The Witness: Yes, sir.

The Court: For want of a better name.

The Witness: Yes.

These publications are available to the public.

The Court: Now, the Bureau of the Census, "Facts for Industry, Glass Containers Series" so-and-so, is all one publication?

The Witness: That's correct.

The Court: By way of illustration, I thought, when I first

read this, you were referring to three separate publications.

The Witness: I am sorry.

The Court: All right. I am just trying to illustrate what your problem is on the stand.

The Witness: Yes.

The other source is from the Glass Container Manufacturers Institute, and those are documents that the government received from that institute on, I presume, a subpoena.

The Court: Well, those basic documents, what do they consist of? Have you seen them?

The Witness: Yes, sir.

[fol. 2772] The Court: What are they? What do they purport to be on their face?

The Witness: Those glass companies that were members of the Glass Container Manufacturers Institute had filed with the, if I may use it, GCMI their statistics on their volume of glass they shipped in the continental United States, and they also furnished GCMI with the amount they shipped in export.

We obtained summaries of these shipments from GCMI, and the information contained in this tabulation with respect to the three glass companies named therein were from those—were from those documents of GCMI. The totals; as I mentioned before, are from the Bureau of the Census.

The Court: Well, how do you arrive at the figure—the last figure in column 1—under “Volume,” of 9,233,280 for all other manufacturers?

The Witness: That is the difference between the total for the three manufacturers and the total as published by the Bureau of the Census.

The Court: Let me ask you this—

The Witness: Yes, sir.

The Court: Do you know, if the Bureau of the Census has figures for Owens-Illinois Glass Company, whether [fol. 2773] their figure is the same as the figure given by the Glass Container Manufacturers Institute?

The Witness: I am unable to check that, because what

the Bureau of Census has is strictly confidential. We can't get that.

The Court: In other words, you just don't know?

The Witness: I don't know, sir.

Mr. McManus: Your Honor, may I interpose a question at this point?

The Court: Yes, certainly.

By Mr. McManus:

Q. Mr. Finn, during the course of our investigation of another merger matter, did we obtain figures from the Owens-Illinois Glass Company relating to their total shipments of glass containers?

A. Yes, we did.

Q. And did these shipments purport to be taken from copies of the reports that the Owens-Illinois Glass Company made to the Bureau of the Census?

A. Yes, they were.

Q. Were you directed, or did you compare the reports that they said were given to the Bureau of the Census [fol. 2774] with those that were furnished to us through GCMI?

A. Yes, I did.

Q. And what was the result of that tabulation?

A. Well, they were substantially the same.

Q. When you say "substantially," how much in error would they be—one per cent, 2 or 3?

A. Less than 1/10 of one per cent.

Mr. McManus: Thank you.

By the Court:

Q. Now, is there anything further you want to tell us about page 1A . . . page 3?

A. Well, I should mention, perhaps, that the Anchor-Hocking Glass Company here, their total includes their subsidiaries.

Q. All right.

A. Next is the American, a similar tabulation. You will note that the sources are the same, but that this tabu-

lation embraces food, non-food, beer and beverages, the volume of shipments for 1955, '56 and '57.

Q. Let me ask you this: If this includes food, non-food, beer and beverages, what does it not include?

A. It does not include wine bottles or liquor bottles.

[fol. 2775] Q. I see. Does it include milk bottles?

A. Yes, sir.

On page 5 the tabulation is for glass food containers. The source is identical to the—

Q. Where did you get the definition "food," or how is "Food," as used in this table, defined by you or by the sources from which you took this information?

A. Well, the Bureau of the Census has a category for glass containers as food. They have it broken down as to narrow-neck and wide-mouth food. This is a consolidation of that, plus another category, dairy products, and still another category of packaged tumblers.

Q. What?

A. Packaged tumblers.

Q. What is that for—jellies?

A. As far as I know, they are jelly glasses, and sometimes they put peanut butter in them; probably usable as a drinking glass when you have emptied the contents.

You will note that this food group I have mentioned here, that contains, included in the food group, food, narrow-neck, wide-mouth, dairy products and packaged tumblers.

The Court: Now, Mr. McManus, is it your intention to introduce or produce before me the Census Department's definition of these items?

Mr. McManus: Your Honor, if it is necessary, we will do that. It has been our position that the food classification has been followed throughout the industry for a number of years, and that at least the industry knows what goes into the food category.

The Court: Yes, that is very well, Mr. McManus—

Mr. McManus: If you, sir, would like to have a copy of that, we will obtain a copy of that.

(The Court: I think you ought to let me have at some point a copy of the Census definitions so at least we will know what we are dealing with.

Mr. McManus: All right, sir.

The Court: And it seems to me that as a matter of orderly procedure, for the enlightenment of not only myself but also of some other appellate court that might happen to review this matter, you ought to have those in the record and marked as exhibits.

[fol. 2777] Mr. McManus: Yes, your Honor.

The Court: So the appellate court will have easy access to them and will be able to follow the thing throughout.

Mr. McManus: Yes, your Honor.

The Witness: Now, going to page 6, it is an identical—similar tabulation, showing beer bottles, returnable and non-returnable, for 1955, '56 and '57.

The Court: Incidentally, is there such a thing as a plastic beer bottle at the present time?

Mr. McManus: Not to the government's knowledge.

The Court: The returnable beer bottle or returnable soft drink bottle that I now see, is that also a form of glass?

Mr. McManus: Yes, your Honor.

The Court: But a different kind of glass, a lighter glass?

Mr. Johnson: Lighter. It is glass, but whether it is different—

The Court: But it is still glass.

Mr. McManus: Lighter but more durable, your Honor.

[fol. 2778] Mr. Johnson: It is still glass.

The Court: All right. Go ahead.

The Witness: Turning to page 7, a similar tabulation involves the beverage containers, returnable and non-returnable.

By the Court:

Q. That is soft drinks, I take it?

A. Mostly soft drinks, yes. The sources are the same.

Q. That is made up in the same way?

A. The same way.

On page 8 is the non-food glass containers, and you will note at the bottom of this tabulation that these containers included in this non-food group are various categories used by both Census and GCOMI, entitled "Household and industrial narrow-neck and wide-mouth; toiletries and cosmetics, narrow-neck and wide-mouth; medicine and health supplies, narrow-neck and wide-mouth."

Q. All right. Let's turn to the next.

A. Next begins a new section, and this is a section on metal containers. The tabulation shows the three leading companies—

The Court: May I ask you this—

[fol. 2779] The Witness: Yes, sir.

The Court: Have the two counsel for American and National Can anything before them from which they can follow this?

Mr. McManus: Your Honor, we could not turn that over to them because we have the problem of having some of Continental Can's statistics in our books.

We have no objection, but perhaps they do.

The Court: I knew that problem would arise, but do you have any objection to these two gentlemen following this on these tables?

[fol. 2780] Mr. Johnson: Well, sir, there is a problem of figures alleged for Continental Can. They are separated all through.

The Court: All right, perhaps it is unnecessary, in any event.

A. The U.S. totals for metal cans are from the Bureau of Census, too. At this point I might say the census figures are reported in tons of steel, and in these tabulations we have converted these tons of steel into units, in thousands of units, in metal cans. Now these conversion figures were derived from a publication put out by the Can Manufacturers Institute, in which they show the same identical figure as the Bureau of Census for tons of steel consumed in the manufacture of cans.

In addition to that, the Can Manufacturers Institute has a tabulation in which they give an estimate of the actual number of cans produced in the United States during a particular year.

Q. That is a production figure rather than a shipment figure?

A. I wouldn't be too sure of that, your Honor, whether it is a production or a shipment figure. I would have to check that.

[fol. 2781] We obtained a conversion factor by dividing this ton steel into the estimated number of actual cans

produced, and obtained some of these—obtained these conversion factors, and then we applied that conversion factor to the various companies for the types of metal cans produced.

Getting back to the source here, in the Bureau of Census figures were shipments from the Hawaiian Isles. We subtracted those figures from the Bureau of Census figures by using the data we had from American Can Company, which company has three plants located in Hawaii, and by that method we were able to get the continental United States shipments.

Mr. Johnson: If the Court pleases, I have been through the tables to which Mr. Finn is referring now.

The Court: Will you speak a little louder, Mr. Johnson?

Mr. Johnson: I have been through the tables to which Mr. Finn is referring now, this section relating to metal containers, and the figures being for 1955, '56 and '57, and that with respect to this group if there are copies to be made available to counsel for American and National for their use here I will have no objection. As I listen [fol. 2782] to Mr. Finn, I can understand that this is going to be very complicated to follow without having them in front of them.

The Court: It seems so to me, Mr. Johnson. I think it would be helpful if we had at least one copy for these two gentlemen.

Mr. McManus: I will sit over by them, your Honor, so that we have one available for them.

The Court: All right.

Mr. McManus: Could you tell me again, Mr. Johnson, which one you do not object to?

Mr. Johnson: Well, I am referring to those in this series, up through non-food containers.

Mr. McManus: Do you have a page?

Mr. Johnson: I think it is page 14.

Mr. McManus: This whole section; is that correct?

Mr. Johnson: Yes.

Mr. McManus: All right.

The Court: All right.

The Witness: Should I go to the next page?

By the Court:

Q. If you have nothing more to tell us about page 10, go on to page 11.

[fol. 2783] A. Page 11 involves the metal food containers. You will note that we have put in the types or end use categories in metal cans that are in this tabulation. I will read them. It includes fruit and vegetable; evaporated milk; other dairy products; fish and seafood; meat, lard and shortening; all other food and coffee.

These unit figures were arrived at in the same manner that I explained on the preceding page.

Q. All right, sir.

A. On page 12, the tabulation is for metal beer containers.

Q. That is the same basis; is that right?

A. Same basis.

Q. All right.

A. 13 is for soft drinks. We arrived at that by the same method.

On page 14 it is for non-food containers, and this contains pet food, oil and all other non-food.

Q. So that for all other non-foods the same sort of category was used in glass.

A. Yes, I would say—

Q. What, household, industrial?

A. Well, you can't tell by that category title. It seems to me—it appears to me it is a catch-all.

[fol. 2784] Q. I see.

A. If it is not classified in the food items or the others we have mentioned previously to this, it is probably placed in all other non-food items.

Now, going to—

The Court: Mr. McManus could I interrupt just a moment?

Is there any objection to Section 3, Mr. Johnson, as far as the American National Can?

Mr. McManus: I'm sorry, your Honor. It has glass in there, also, so I guess—

The Court: I think you'd better not.

Mr. McManus: —we had better not.

The Witness: Shall I continue?

The Court: Yes, please do.

A. (Continuing) Going to page 16—

Q. Well, 16, as I understand it, Mr. Finn, is simply a combination of figures in the one category and figures in the two category, put together, and percentages drawn from them; am I right?

A. That is correct, sir.

Q. In other words, you take the total glass for these years, the total metal for these years, you add them up and then you figure out the percentages ascribable to [fol. 2785] each of the companies?

A. That is the method we used.

Q. All right.

A. And we have done that for—

Q. You have done that for the various categories which you have mentioned?

A. Various categories.

Q. In each case, and these represent that sort of combination of figures.

A. That is correct, sir.

Q. All right, so much for—

A. That would be so much for folder A.

Q. —folder A.

A. Now, folder B shows a breakdown between the east and west markets for both cans and glass.

Q. Is that all that folder B does, is break this down geographically?

A. Yes, sir.

Q. Does it purport to break down the various categories of figures on a geographical basis?

A. Yes.

Q. In other words, it uses the same categories of figures and classifications as we used in A, and purports to break them down on a geographical basis?

[fol. 2786] A. That is correct.

Q. Now, how do you arrive at the—you have some notes here?

A. Yes, I do.

Q. Suppose you tell us how in general the geographic totals were arrived at?

A: Starting with glass first, we obtained from GCMI, as I mentioned previously, statistics on the shipment of glass containers, and that also included those companies who operated on the west coast. In addition to that, we secured directly from some of the companies that are not members or didn't report their statistics to GCMI, direct from those people, those letters or references to them which are mentioned on page 6.

Q. Would those two companies be American and National, among others?

A. These are glass companies.

Q. These are glass companies.

A. Yes, sir. The letters are—I can read the companies they are from.

Q. Well, they are the companies that were cited in the exhibit itself, I take it?

A. That is right.

[fol. 2787] Q. It is not necessary to repeat them.

A. Well, after obtaining these statistics furnished by those companies by letter, and for those companies that were operating on the west coast, who furnished us statistics through GCMI, we were able to arrive at the volume of glass shipments made by those plants located west of the Rocky Mountains. After doing that, we merely subtracted that from the continental United States total.

Q. And arrived at the eastern?

A. We arrived at the east.

In the metal containers, we found out through American Can's tabulations and Continental Can's tabulations that two plants were operated in the States of Colorado. Now, from the published statistics of the Bureau of Census, on a geographical area basis by states, or combination of states, we subtracted the shipments from those two plants from the census data for the mountain area, which was the geographical location published by the Bureau of Census and giving the shipments out of that particular area. We then arrived at a figure for the mountain states area, or states we have allocated to the west coast market.

Q. What states were put in the mountain states area?

[fol. 2788] A. Those were the states located west of the eastern boundaries of Idaho, Utah and Arizona.

Q. All right, and they were included in your test of what, or actually did include what?

A. Those were what we now—it was what we call the west geographical area.

Q. Now, the west geographical area, as was used in these charts or tables, comprises what states, plainly California, Oregon and Washington?

A. Yes.

Q. Now the next layer?

A. It is Nevada, Utah, Arizona, Idaho—I have left out one. If I had a map to refer to, your Honor, I could point them out very easily.

The Court: Have you got a map?

Mr. McManus: We will get one.

Your Honor, I guess it isn't here, but we defined the area and gave you a map.

The Court: Yes.

Mr. McManus: It is not here in the courtroom. I guess the clerk hasn't got that. I will get the map, your Honor.

By the Court:

[fol. 2789] Q. Is half of Montana here or not?

A. Oh, no half states.

Q. No half states. Well, go ahead, we will come back to it.

A. Well, after arriving at the volume produced in the mountain states, we added that to the total volume produced for the west coast states, that was mainly California, Washington and Oregon, and we have a figure for the western area of United States, and with that we subtracted from continental United States and arrived at an eastern total.

Now, the figures, total figures, in this tabulation are tied in with the ones in folder A.

Q. This is a further breakdown of the figures in folder A on the geographical basis that you suggest; is that right?

A. That is correct. Shall we go through it?

Q. I don't think it is necessary to go through it chart by chart, unless there is some special reason for it.

The Court: What is your view, Mr. McManus?

Mr. McManus: No, your Honor. We would like to offer them as they are. We just wanted to explain so that your Honor will understand.

[fol. 2790] The Court: Well, if all these are, are a breakdown by the east-west geographical area of the figures in folder A, as they have been described, then I see no necessity of going any farther at this point.

Mr. McManus: I see. That's right.

The Court: All right.

By the Court:

Q. Now let's go to folder C, 803.

A. Folder C, on page 2, gives a tabulation for the total shipments of metal containers by the three leading manufacturers, but it differs from tabulation that was in folder A, to this extent: that it excludes on line 2 metal containers shipped by captive plants.

Q. How do you ascertain what are captive plants and what are not captive plants?

A. My own general knowledge of captive plants, captive plants are those organizations that manufacture metal containers for their own use. In other words, the cans they make are used to put the product or the ingredients that this particular company makes.

Q. All right, I understand that, Mr. Finn, but where do the figures come from with respect to—where do the [fol. 2791] so-called captive plant figures come from?

A. Those are listed also in the Bureau of Census figures.

Q. By named companies or by categories?

A. No, just by this category. There is no—

Q. No identification?

A. No identification.

Q. Of what captives are?

A. That's right, sir; no identification. We have subtracted these captive plants volume or rather shipments from the continental United States totals, and we arrived at a figure showing the shipments of cans for sale in the United States. In other respects, this tabulation is very similar to the ones in folder A.

Q. All right, what is on page 3?

A. On page 3, this tabulation shows the production and shipment of crown caps by Continental can, compared to the United States totals, for the years 1955, '56 and '57. The source of this material was from Continental Can production and shipment statistics, from DP2343 and through 2444, and 3297. U.S. totals are from the U.S. Department of Commerce, Bureau of Census facts for industry, enclosures for glass containers and crowns. All other manufacturers represent the difference in the totals [fol. 2792] for the United States of Continental Can.

Q. All right, 4?

A. Number 4 is 1957—1956 and 1957 production and shipment of vacuum, screw thread, lug, commercial closures made from tin mill products by White Cap and Hazel-Atlas Company in 1956. This shows the production and shipments of these types of closures in the United States, and which totals are from the Department of Commerce, the Bureau of Census, facts for industry, and their publication entitled "Closures for glass containers and crowns."

Q. All right. Now I take it the next chart is a breakdown of the—contains part of the figures, breakdown of the figures, contained on the previous chart, on page 5.

A. Yes, your Honor, but there is a slight difference.

Q. All right.

A. The chart on page 5 shows the production of vacuum type commercial closures for 1958 by White Cap, and the screw thread and lug type non-vacuum type closures by Hazel-Atlas.

The source is the same, from the Bureau of Census. [fol. 2793] In 1958 the census changed their method of reporting these closures, and that is the reason why we had to separate 1958 from 1956 and '57.

Going to number 6, this shows the number of dollar value items per packaging material in 1957 and 1958, and we have compared this to the net sales and operating revenues of Continental Can Company.

Q. Wait a minute. What do you mean by the value of packaging materials?

A. This is a statistic that is gotten out by the Modern Packaging Encyclopedia, and they have been putting it out for a number of years.

Q. What does it purport to include, the value of packaging material? I don't understand how you define packaging material in that sense?

A. Your Honor, I haven't tried to define it in here at all. This is merely—

Q. In other words, you have got a figure called "packaging material," from something called "Modern Packaging Encyclopedia"?

A. Right.

Q. And you have compared that figure with the net sales and operating revenues of Continental Can.

A. Yes.

[fol. 2794] The Court: So thus far, Mr. McManus, I have been able to follow what I might call suggested relevance and materiality of the figures, but I am totally unable to follow you on this one.

Mr. McManus: Your Honor, we understand that it is very difficult to figure out what the total market is for the packaging industry as a whole.

The Court: What do you include in the packaging?

Mr. McManus: Your Honor, we include everything—

The Court: Have you got this learned volume, this encyclopedia? Is it in court? Is it available?

Mr. McManus: We will get it for you, your Honor. We don't have it at the moment. I will have to get Mr. Finn or somebody else to get it for you. I will get it promptly.

The Court: Well, now, what sort of thing does it include? Suppose I want to buy Christmas wrapping, is that a packaging material?

Mr. McManus: Can I read off what it includes? The chart spells it out: It includes paper and paperboard containers, grocery and—

[fol. 2795] The Court: I see it. You don't have to read it off. This is an analysis of what it contains?

Mr. McManus: That's right, your Honor.

The Court: All cellophane; polyethylene, unconverted; aluminum foil; cooperage; fruit and vegetable packages; cigar boxes.

Mr. McManus: That's right, your Honor. It is a large industry, the third largest in the United States.

The Court: It seems to me not only a large industry but

one of the most fantastically diversified industries I have ever come across.

Mr. McManus: It is rapidly becoming less diversified, your Honor.

The Court: So if my daughters wrap up Christmas gifts, they use packaging materials, with holly and Christmas seals and those lovely red ribbons—

Mr. McManus: Your Honor, as I understand it, this is packaging for users to package products in, and it wouldn't just include your red ribbons. My only answer—

The Court: Suppose they sell wrapping paper to retail stores.

[fol. 2796] Mr. McManus: It would include that, your Honor. It would include that. Your Honor, I admit that this is all that is available. It is published annually by the—

The Court: I know it is all that is available. I am not, Mr. McManus, being critical of the fact that it is too little.

Mr. McManus: The area or the statistics?

The Court: I mean, I am not saying that you haven't got enough in here. All I am saying is that you have got everything in here but the wrappings of the kitchen stove or the kitchen sink, or both.

Mr. McManus: Your Honor, my only answer—

The Court: Is it your theory, Mr. McManus, that this thing is a line of commerce?

Mr. McManus: Yes, your Honor.

The Court: I have heard no evidence whatsoever on that subject yet.

Mr. McManus: Yes, your Honor.

The Court: Are we to expect any evidence on that subject?

Mr. McManus: Your Honor, this is all the material that we do have indicating the size of this industry.

[fol. 2797] The Court: And is this all the evidence that you do have indicating that this is what might be called a line of commerce within the meaning of Section 7 of the Clayton Act?

Mr. McManus: Yes, your Honor, if you are talking about evidence.

The Court: Well, that is what I am talking about. This

lawsuit is not going to be decided on the basis of a document called the Modern Encyclopedia of Packaging.

Mr. McManus: I see, your Honor.

The Court: Well, all right.

Mr. McManus: Your Honor, could I ask one question? Is that the last chart you have in your book?

The Court: I have something here called "Comparison of glass container plants east and west of the Rocky Mountains for the years 1920 to 1938, and January 31, 1960." Are you going to tell me about that?

Mr. McManus: Mr. Finn will.

The Court: I mean Mr. Finn.

The Witness: Well, this tabulation shows by states the glass container plants that were in existence in 1920, those [fol. 2798] in existence in 1938, and the number on January 31, 1960.

You will note on page 2 here that the source of this information is from the Temporary National Economics Committee publication, and for the year 1960 the data is from American Glass Review, Glass Factory Directory. On this page also we have some modifications of the data that is contained in this source material. We also have included plants that are now under construction or in the planning stage.

By the Court:

Q. Where does the data come from—plants now under construction or in the planning stage?

A. Well, it appears that I have neglected to put that in, your Honor. That came from the publication entitled "American Glass Review."

Q. In other words, the American Glass Review, you say, has plants under construction or in the planning stage listed also?

A. Periodically they put a—

Q. An addendum, sort of?

A. An addendum, sort of.

Mr. McManus: Your Honor: if I could interrupt at this time, I would like to show Mr. Finn the map so [fol. 2799] that he can—

The Court: Yes, let's find out what states we are dealing with now.

Mr. McManus: Will you name them to his Honor?

The Witness: The States of Washington, Oregon, California, Idaho, Nevada, Utah and Arizona, they are all the states that are—

The Court: Yes, I see. They are the states that are west of the Arizona-Utah-Idaho border—Eastern border?

The Witness: Eastern border.

The Court: We will take a brief recess at this point.

(Short recess.)

Mr. McManus: Your Honor, those are the tables which Mr. Finn compiled. We will now go to Exhibit 800, which was put together by Mr. Tolton.

(Witness excused.)

JULIUS H. TOLTON, called as a witness by the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McManus:

Q. Mr. Tolton, by whom are you employed?

[fol. 2800] A. I am employed by the Antitrust Division of the Department of Justice.

Q. And for how long a period have you been employed by them?

A. Approximately 12 years.

Q. And what is your title in that division?

A. My title is business economist.

Q. And do you have any major economic degree?

A. Well, I have an undergraduate degree which included economic study.

Q. Now, are you familiar with Government's Exhibit 800?

A. I am. I compiled it.

Q. And was that exhibit prepared under your direction?

A. Yes, it was under my supervision.

Q. And did you—

The Court: You had a staff working with you on that?

The Witness: I did, your Honor.

The Court: But you directed the staff?

The Witness: I did, yes, your Honor.

Q. And you took the basic data from the footnotes and applied it in chart form?

[fol. 2801] A. I did.

The Court: From the what—

Mr. McManus: Referred to in the footnotes; the basic data referred to in the footnotes.

The Court: I see.

By Mr. McManus:

Q. Much as Mr. Finn did with the tables?

A. I did, yes.

Mr. McManus: Your Honor: we would like to qualify Mr. Tolton merely on the same basis that we qualified Mr. Finn; just that he—

By the Court:

Q. Well, tell me this: what has been your general experience in the compilation of charts or translating figures into chart form?

A. Well, your Honor, going back, in college I took several courses in statistical—

Q. Where was that?

A. University of Washington. And following that time, or shortly thereafter, I was employed by the Department of Justice, and I have dealt with, you might say, figures and industry studies and various things which took into account much statistical work for the past 12 years.

[fol. 2802] Q. Have you testified in court with respect to charts?

A. I have previously.

Q. How many times?

A. Well, previously in the Brown Shoe case.

By Mr. McManus:

Q. And that was the United States v. Brown Shoe Company that was tried out in St. Louis, Missouri?

A. It was.

Q. And you compiled much of the statistical data for that case?

A. Yes. I have compiled statistical data that was used in court prior to that time, but never testified to it.

Q. I see. But in that case you compiled much of the statistical data and also testified with respect to it?

A. Yes.

Mr. McManus: Your Honor, we would like to follow the same procedure with Mr. Tolton as we did with Mr. Finn, if there is no objection.

The Court: All right.

Mr. McManus: The pages in Government's Exhibit 800 are numbered, starting with the index, from 1 right on, [fol. 2803] through.

By the Court:

Q. First of all, Mr. Tolton, let me ask you: are your charts based on figures in the tables that were testified to by Mr. Finn?

A. Most of them, yes.

Q. Will you point out to me the instances in which they are not?

A. Yes. The first page is the index page, as previously described, and the second page—well, it defines some terms, I guess would be the briefest way to explain it.

Mr. McManus: Would you speak up just a little bit, Mr. Tolton.

The Witness: Yes.

A.² (Continuing) Page 3 starts into the section "Glass Container Shipments Into the United States," and page 4 begins the first chart.

This chart, called the glass container shipments, 1955, "Total Domestic," "Leading Four Companies" and "All Others" and "Hazel-Atlas Share," is material that conforms with Mr. Finn's statistical book A, table 1 A. It conforms to that in its entirety.

[fol. 2804] Q. I take it the same thing can be said—now you come to narrow-neck and wide-mouth, or you come to the various breakdowns of the types—"Glass Shipments." Is that glass container shipments?

A. Yes, that's right, your Honor. I would rather hold up going into that because the following chart, which is "Total Narrow-Neck," actually is part of 1 A of the statistical tables, because Mr. Finn combined both narrow-neck and wide-mouth together, so to that extent it does not conform in its entirety as to the statistical tables.

Q. You have taken the figures out of his total figures of wide-mouth and narrow-neck, you pulled the narrow-neck figure?

A. Yes, your Honor, both the Census Bureau and the GCMI figures were broken down in the same categories, broken down into the areas of narrow-neck and wide-mouth, and these conform in that respect to the Census Bureau and the way the GCMI figures were broken down.

The second chart deals with total narrow-neck, the same sources as have been previously expressed with the tables.

Should I continue on, your Honor?

[fol. 2805] Q. Yes.

A. Page 6 is the next table, which deals with food, narrow-neck, as the category was expressed in both the "Facts for Industry" and the Census, and the Glass Container Manufacturers Institute figures.

Page 7 deals with medicinal and health supplies, narrow-neck.

Page 8 deals with chemical, household and industrial, narrow-neck.

Page 9, toiletries and cosmetics, narrow-neck.

Page 10, beverages, returnable.

Page 11, beverages, non-returnable.

Page 12, beer, returnable.

Page 13, beer, non-returnable.

Page 14, liquor.

Page 15, wine.

And then we get into the wide-mouth category. Total wide-mouth is on page 16, and, as I expressed before, this would be part of the table A 1 A, if I may express it that way. That is page 16.

Then food, wide-mouth, page 17.

[fol. 2806] Page 18, medicinal and health supplies, wide-mouth.

Page 19, chemical, household and industrial, wide-mouth.

Page 20, toiletries and cosmetics, wide-mouth.

Page 21, dairy products. And that is the end of that section 1 dealing with glass containers under those categories.

Page 22 has the title page "Metal Container Shipments in the United States."

Page 23 expresses the data for American Can, Continental Can and National Can, named in each of the charts in group 2, was secured individually from the above firms.

Page 24 begins the metal can shipments series. The title is "Metal Can Shipments, 1955, Total Industry, Leading Three Companies and All Others, Continental Can's Share."

Now, this incorporates all of the tables, all of the table 2 A B that Mr. Finn dealt with previously, and we have the same source that Mr. Finn's tables show.

Should I continue?

Q. Yes.

A. All right. Page 25 is fruit and vegetables, including [fol. 2807] juice.

Page 26 is evaporated and condensed milk.

Page 27, other dairy products.

Page 28, meat, including poultry.

Page 29, fish and sea food.

Page 30, coffee.

Page 31, lard and shortening.

Page 32, beer.

Page 33, pet food.

Page 34, oil, open top, one-quart and five-quart.

Q. Oil, open top—what sort of oil is that?

Mr. Johnson: Motor oil.

The Court: Motor oil. Thank you. It is just called oil—petroleum, presumably.

Mr. Johnson: Substantially. I wouldn't say 100 per cent.

A. (Continuing) Page 35, soft drinks.

Page 36, all other food, soup and baby foods.

Page 37, all other non-foods.

And page 38 we go to the chart book, series 3. The title is "U. S. Metal Container Shipments and Continental Can Participation by Regions, and U. S. Glass Container Shipments and Hazel-Atlas Participation by Regions."

Page 39, the first chart in this series, total metal container series and Continental Can participation for 1955, all types; total U.S., billions of units, and we have the same sources as were previously expressed by Mr. Finn. This follows the A book in the tables, table 2 A B in its entirety.

Page 40, total metal container shipments and Continental Can participation, all types, west of the Rockies, and this conforms to tables in the B series, 4 A. It is on a unit basis.

Page 41 that follows is the description, or the notes applicable to the chart previously mentioned, page 40.

Q. Isn't that in essence a duplication of the notice which was submitted on his charts?

A. Yes, certainly in substance, and it may be pretty much word for word.

Page 42 is total metal container shipments and Continental Can participation in 1955, all types, east of the Rockies, and this conforms to the table series B 3 A.

Page 43 is the notes applicable to the previous chart, page 42.

[fol. 2809] Page 44, total metal container shipments and Continental Can's participation, 1955, for food. This is the total U. S. in billions of units, and this conforms to our table series A, table 2 C.

Page 45, total metal container shipments and Continental Can participation for 1955, food, west of the Rockies. This conforms to the table B series, 4 B, the individual table.

Page 46 is the notes applicable to the chart on the previous page, 45, as it applies to the chart.

Page 47, total metal container shipments and Continental Can participation, 1955, food, east of the Rockies, and this conforms to the table series B, table 3 B.

Page 48 is the notes applicable to the chart previously mentioned on page 47.

Page 49, chart, total metal container shipments and Con-

tinental Can participation, 1955, non-food. This is the total U. S., and this conforms to table series A, table 2 B—2 F. I am sorry.

Page 50, total metal container shipments and Continental Can participation, 1955, non-food, east of the Rockies, in billions of units, and this conforms to our table B series, the [fol. 2810] 3 E table.

On page 51 are the notes applicable to the chart on the previous page, 50.

Page 52 we go into the total glass container shipments and Hazel-Atlas participation, 1955, all types; total U. S. in billions of units, and this—well, this is part of B 7 A in the table series, and the sources—the sources here are from the Facts for Industry and interrogatory 13 by the Hazel-Atlas Company.

Now, page 53, total glass container shipments and Hazel-Atlas participation, 1955, all types, east of the Rockies. Now, this conforms to the table series B, table 5 A.

Page 54 is the notes applicable to the previously mentioned chart on 53.

Page 55 is the total glass container shipments and Hazel-Atlas Glass participation, 1955, all types, west of the Rockies, and this conforms to the table B series, table 6 A.

Page 56 is the notes applicable to the previous chart on page 55.

And page 57, also—well, it lends itself, or assists in the making up of the chart on page 55. That is source data.

[fol. 2811] Page 58, total glass container shipments and Hazel-Atlas participation, 1955, food, total U. S., billions of units, and this is part of the B table series, 7 C.

Page 59, total glass container shipments and Hazel-Atlas participation, 1955, food, west of the Rockies. This conforms to the B table series, table 6 C.

Page 60 and 61, I might say, are the notes applicable for the sources of the chart previously mentioned on page 59.

Page 62, total glass container shipments and Hazel-Atlas participation, 1955, food, east of the Rockies, and this conforms to the table series B, table 5 C.

Page 63 is notes applicable to the previously mentioned chart on page 62.

Page 64, total glass container shipments and Hazel-Atlas

participation, 1955, non-food, total U. S., and this conforms in part to the table series B 7 F.

Q. Where does the rest of the data come from?

A. Well, your Honor, I would have to look at that. It [fol. 2812] would only take me a moment to distinguish as to what portion it was. In other words—well, no, I shouldn't say that until I have looked at the tables themselves. Would you like me to do that?—

Mr. McMannus: What table does it conform to?

The Witness: Well, it is part of table B 7 F. I think I have a copy.

A. (Continuing) Your Honor, table B 7 F shows not only glass container shipments but also metal container shipments, and then combines them, and we only use that portion which pertains here to glass container shipments.

Q. All right.

A. Page 65, the chart is total glass container shipments and Hazel-Atlas participation in 1955, non-food, east of the Rockies, and this is the B chart series, table 5 F.

Page 66 is the notes applicable to the previously mentioned chart on page 65.

Page 67 starts a different grouping, group 4, and this is historical growth of metal and glass container shipments expressed as index numbers and shown as a trend.

[fol. 2813] The chart on page 68 has as its title "Historical growth of metal and glass container shipments expressed as index numbers and shown as a trend" for all types of glass and metal containers. The years 1939-1958, and the index 1939 equals 100 for those numbers expressed on the right and left, the right and left side of the chart.

The numbers at the bottom are the years 1939, a mid-break, 1948, and 1958, with the intervening years shown only as a dashed line there at the bottom.

The source for these was the glass containers, the totals, U. S. totals, 1939 through 1956, is from GCMI—well, I guess an annual report—1957, page 47, and the 1958 is from the Bureau of Census glass container summary, 1958, series M32G.

The metal cans for the U. S., totals, 1939 through 1956, from the Can Manufacturers Institute, I'd say annual sum-

mary, March, '49, page 6, and their 1947-1956 CMI—well, summary, I'd better say it that way—page 12, 1948, and then they had another summary, which was 1948 to 1957, and we used page 10 there. The 1958 was from the Bureau of Census, metal can summary, 1958, series M34D.

And page 69 is the supporting data—well, supporting [fol. 2814] data that was extracted and developed in order to make the chart on the previous page, and I think the same—the sources there expressed are the same as those mentioned on the previous page.

On page 70 we have "Historical growth of metal and glass container shipments expressed as index numbers and shown as a trend" for food, the food line, 1940-1958, in glass containers. That was expressed—and also in metal containers. This chart has on its left and right side the index numbers, ranging from below a hundred here to—it is up to 340. At the bottom of the chart are the years 1940 to 1958, with a dashed line showing—representing each year in the series.

The following page gives the supporting data for the chart mentioned on page 70, and we have as our sources for glass containers and food, 1940 to 1956, from GCMI summary data, and it is page 47.

Mr. McManus: Excuse me, your Honor.

The Court: Yes.

Mr. McManus: Much of this data is just the chart form of the tables which were explained to you, and I don't want to interrupt, but I thought that perhaps you would like it if Mr. Tolton would just explain the rest of them, the ones [fol. 2815] that are different from the chart forms.

The Court: I think that is true in all these other ones.

Mr. McManus: Well, some of the others are taken from different sources, and those I thought would be better if he explained to you.

The Court: Mr. Tolton, if you will refer to the ones that come from different sources than from Mr. Finn's tables, if you will give us the data regarding those, I think it would be better.

The Witness: Yes, your Honor.

Now this is a different series. This is a different data,

certainly different from what appears in the tables—well, I guess substantially, anyway.

By the Court:

Q. All right, point out where you use data different from those that are set forth in the tabulation?

A. All right. Well, as I expressed, the data for the glass containers was from the GCMI—1940-1957 was from the GCMI manufacturers. Glass Containers Manufacturers Institute, I guess it is, annual summary of 1957, page 47, and 1958 data was from the Bureau of Census' glass container [fol. 2816] summary of 1958, series M32G.

Metal cans, food, was, in 1940 to 1951, was from the quarterly containers and packaging, in the spring 1952 issue, page 36, table 16. 1952 to 1958 is from the Bureau of Census of metal can summaries, 1952 to 1958, series M34D.

Q. In other words, quarterly containers and packaging is Bureau of Census material, again?

A. Yes. Let me say this: At least it is Department of Commerce, which in part, I presume, was broken down and made up by the Bureau of Census. It has the imprimatur at least of the Department of Commerce.

Well, the following page expresses the source data that was previously mentioned, primarily.

Now we are going over to chart, series V, metal and glass container shipments, and this whole series, if I may look at it and note it a moment here, conforms to Mr. Finn's tables, so I think we can eliminate that for the time being.

Q. Yes.

A. Now, series VI was not derived from any of the tables, so I will go into that presently.

[fol. 2817] On page 84 is the title for this chart, series VI, "Continental Can Metal Division and Hazel-Atlas Division Common Customer Sales."

Page 85, the first chart of this series is "Continental Can Metal Division and Hazel-Atlas Division Common Customer Sales 1956-1957 total common customers," and the source for this chart was in answer to Government's interrogatory.

Q. What do you mean by "common customer"?

A. In which both Continental Can Metal Division and

Hazel-Atlas Division sold items of glass and cans in their respective organizations to the same customer or the subsidiary within the firm. In other words, there would be listed the firm name and there might be subsidiaries, but we included any of the subsidiaries in the whole firm name.

Page 86, "Continental Can Metal Division and Hazel-Atlas Division common customer sales 1956-1957," and this was the value of the common customer sales, and this is from the answer to the interrogatory.

Page 87, "Continental Can Metal Division and Hazel-Atlas Division common customer sales 1956-1957 (percent of common customer sales), and that includes—

[fol. 2818] By Mr. McManus: •

Q. Mr. Tolton, would you explain what that percentage is, per cent of what?

A. Well, that is the—

Q. What does the 81.4 per cent relate to in column 1957?

A. Well, in other words, the total common customers would be a hundred per cent, of which the value—at least on a value basis, as you see on page 86, previous page, if you added the total value as in 1956, the \$147,437,000 represents 81.4 per cent of the total sales within that period, while the \$33,000,000 represents 18.6 there.

Does that answer it?

Q. Yes.

A. Chart, series VII is also—does not appear in the tables, and this is titled on page 88 "Tin can and other tin-ware industry." Now this expresses the tin can and other tin-ware—excuse me. Page 89, going to the first chart, "Tin can and other tin-ware industry," the number of firms and gross sales of industry by groupings, based on the firm asset classification.

By the Court:

[fol. 2819] Q. Where did you get the data for that?

A. This, your Honor, came from the Internal Revenue Service, in their Division of Statistics, which we have here.

Q. Internal Revenue Service?

A. Yes, your Honor. They have a Division of Statistics, of which they—well, they compile a series of statistics—that is, it is a Division of Statistics.

Q. How do they go about compiling those, and where do they get the data? I haven't heard about those before.

A. Well, basically, your Honor, from the—

Q. Tax returns?

A. —from the tax returns, in which the firm not only makes its tax return, but it also incorporates balance sheet and profit and loss data.

Mr. McManus: Your Honor, in the room back there we do have copies of the basic data. They are under the blue seal, and all that kind, but if you would like to look at it when Mr. Tolton is almost finished, we can get it.

The Court: I won't look at it at this point.

Mr. McManus: We will be glad to make it available. .
[fol. 2820] The Court: I think you had better put up a red flag at least on this one.

Mr. McManus: Yes, your Honor.

A. (Continuing) Well, utilizing that data, we were able to make this breakdown from that, the information furnished by the Internal Revenue Service.

The first chart dealt with number of firms and gross sales of industry, and that was page 89.

The second chart in this series has as its title "Tin can and other tin-ware industry number of firms and gross sales of industry by groupings based on firm asset classification," and this was also part of the information derived from the Internal Revenue Service, or at least compiled from data from the Internal Revenue Service. That is page 90, and that concludes that series.

Page 94 we began the chart series VIIH, which has to do with domestic acquisitions of Continental Can Company in the container and related product field. On page 90—I beg your pardon—page 92 was the chart, of which its title is "Domestic acquisition of Continental Can Company in the container and related product field," and on the left is the product field, and going from left to right [fol. 2821] at the top indicates the decade within which the acquisitions were made, and the source for these, for this chart, was the submission of Continental Can Company in connection with FTC study of acquisitions, which I think is Government's 785 and 786, Government exhibits; and then we also used the annual reports of Continental Can Company, Moody's Industrials, and the Continental Can

proxy statement of October 26, 1956, to compile that chart.

On page 93 we begin chart series IX, "Shipments of commercial closures of vacuum and non-vacuum types, screw thread, lug and crown caps in the United States."

I might say, your Honor, these follow our statistical tables, conform to them, I should say.

The next two tables—charts on page 94 and 95 are part of the tables, series C, of Mr. Finn's, and that concludes the charts.

Mr. McManus: Your Honor, that would be our presentation before the offer, and I assume that probably because the tables are basic, if any cross-examination would be done we would start probably with Mr. Finn.

The Court: Yes.

Mr. McManus: Also, before we get into this, I understand [fol. 2822] that Mr. Austern has a question.

The Court: Excuse me, Mr. Austern.

Mr. Austern: With your Honor's permission, neither Mr. Goldberg nor I have been seeing these charts, we have been hearing the testimony, and we should like respectfully to have inquiry made to clear up something that we couldn't understand simply by hearing.

Section 2 on the metal charts, on pages 25 through 36, we heard the witness testify to what I believe to be a breakdown on metal can shipments, U.S., showing Continental's share, and then it said "by three companies." May we respectfully ask that inquiry be made as to whether each of the three companies are shown on those charts, which we haven't seen, or whether the aggregate of the three companies?

The Witness: It is the aggregate, Mr. Austern. There is no individual data shown for American Can or National, individually.

Mr. Austern: Well, in the light of the understanding as between the Government and American, and, as I understood, between the Government and National, there was to be an aggregation of the various census categories, such as lard, shortening, pet food, and so forth. As I understand [fol. 2823] stand what the witness said, your Honor, there is an aggregation within the census category of American and National's share.

The Court: There is some in the chart.

Mr. Austern: I haven't seen the chart, your Honor.

The Witness: The aggregate would have all three, American, Continental and National.

Mr. Austern: Then you show, as I understood your testimony, Continental's share?

The Witness: Yes.

Mr. Austern: So that one could readily deduce—

The Court: What the total of American's and National's share is.

The Witness: Yes, as a total. You wouldn't, individually, as a company.

Mr. Austern: May we, with your permission, consider whether that is a rather oblique approach to something that I am not sure I understand. I should like to study it until tomorrow. I now understand what his Honor means.

The Court: All right.

Mr. McManus: Did you want Mr. Finn to now take [fol. 2824] the stand?

The Court: I think, in the light of this, do you want to postpone the cross-examination until tomorrow?

Mr. Johnson: It would be more convenient, if that suits your Honor.

The Court: It does seem to me that we have gone through this stuff this afternoon, and I cannot imagine that we will very much profit by 15 minutes this afternoon.

Mr. McManus: Also, your Honor, if we could use those 15 minutes in just discussing with you in chambers, as I explained before?

The Court: Yes, you can come in.

Mr. Austern: Without burdening your Honor, may I inquire of the witness whether on those charts, to which I adverted, beginning on page 25, Section 2, are there any categories in which either American or National alone manufactured the can?

The Witness: Well, I would have to look at the basic data before I could give you a concrete answer.

The Court: No, we are not talking about the basic data at the moment. We are talking about the *basic data at* [fol. 2825] *the moment. We are talking about the chart.*

The Witness: Well, there is nothing on the chart that would show.

The Court: Is there anything on the explanatory data annexed to the chart which would show?

The Witness: There would not be.

Mr. Austern: Is there anything on any of your own other data which perhaps might indicate as any one of the blocks or boxes that you have in your charts that American makes it and Continental doesn't?

The Witness: No, not at all.

Mr. Austern: This is somewhat different, sir.

Mr. Goldberg: May I ask one question?

The Court: Yes, Mr. Goldberg.

Mr. Goldberg: Those particular charts that Mr. Austern was referring to, are they reflected in the tables in, is it B?

The Witness: Well, A or B, whichever—

Q. A or B. In other words, this is the—the chart merely pictorializes the actual data that is shown in table B; is that it?

The Witness: Well—

[fol. 2826] Mr. Goldberg: Or do you go beyond what is in the table?

The Witness: I don't know how to answer that. Well, just for instance, I mean, to cite you an example, if I might, we have on page 25 "fruit and vegetables, including juice," of which we have the leading three, American Can, Continental Can, National Can, and we have then an aggregate there, then "all others"; then Continental Can's share. Now this does take in part of the A table series, table 2C.

Mr. Goldberg: May I put it another way? Are there tables in either A or B or C, whichever this is derived from, that would be broken down into the fruits and vegetables, as such?

The Witness: I think not as such.

Mr. McManus: They are not tables that were broken down.

Mr. Goldberg: I see. Then this is a further splintering of the tables that were there.

The Witness: To that extent, yes.

Mr. Goldberg: As to these groups of charts that Mr.—

The Witness: What I am saying is, these follow primarily the census categories, I mean, as such.

[fol. 2827] Mr. Goldberg: That I know, yes, sir.

The Witness: Well, Mr. Finn's tables in many instances.

do not. They follow more of what we might call a line of commerce, or something like that.

Mr. Goldberg: No, Mr. Finn's tables cover the four aggregates, four categories or groupings that Mr. Austern referred to.

The Witness: Yes.

Mr. McManus: That is correct.

Mr. Goldberg: And this then is a splintering of a breakdown of those tables into the census categories.

The Witness: Yes, that's right.

The Court: But not beyond the census categories.

The Witness: No, not beyond it; that's right.

Mr. Austern: Excuse me. Just so—

The Court: As I understood it, gentlemen, there was no objection to overall figures for the year based on the census categories, and provided it is not broken down regionally beyond east-west.

Mr. Austern: May I suggest, sir—

The Court: Is that correct, or am I wrong?

Mr. Austern: I think not, sir. The understanding between the Government and these two non-parties to the case [fol. 2828] is that the material in the census data may be aggregated by food, beer, soft drink and non-food, and each of those, United States and east and west. What appears to have happened here is that that understanding has been completely honored in the statistical tables. Now, whether it has or has not been fully honored in the charts adverted to, which we haven't seen, I am not quite clear. I am clear that the category of food, if the Court please, has been broken down and fragmented into at least four categories, and I am equally clear that the category of non-food has been broken down into three segments. Now what I have to parse out, and I would like not to burden the Court, but do it overnight, is whether the breakdown of the agreement—

The Court: Is detrimental.

Mr. Austern:—is detrimental when we are married to this other company as a total. I'm not quite clear on it, but I simply want to be clear as to what was on the chart we haven't seen.

The Court: You might bear in mind I have no matrimonial jurisdiction.

All right, gentlemen, we will take a recess to tomorrow [fol. 2829-2846] morning. In the meantime, I will see counsel in the robing room with the reporter.

Good night.

[fol. 2847] LEO V. FINN, resumed.

The Court: I think it would be just as well, Mr. Clerk, to lock the door.

Now, you have been sworn, sir. You remember you are under oath.

The Witness: I do, sir.

Cross-examination.

By Mr. Johnson:

Q. Mr. Finn, your work in preparing these tables was not purely mechanical work, was it?

A. No, sir, not purely mechanical.

Q. It involved the selection of statistics, did it?

A. Yes, sir, it did.

Q. It involved organization of them?

A. Yes, sir.

Q. Some adjustments of them?

A. Yes, it did.

Q. And it involved an appraisal of the statistics?

A. To some extent.

[fol. 2848] Q. And it involved analysis of the statistics, did it not?

A. Yes.

The Court: Involved what?

Mr. Johnson: Analysis.

A. Yes.

Q. You said you had been with the Department of Justice in the Antitrust Division, I believe, for 22 years.

A. That's right.

Q. How long, sir, have you been a business economist for the Department of Justice?

A. When I first started in in the department, that title wasn't used. They had a title called "expert."

The Court: That is a very good title.

A. That was a Civil Service Commission title as distinguished from a Department of Justice title. I was an expert for about five years until I was——

Q. During that period of time what did you do?

A. I worked on cases and investigations, and for a good part of that time I was assigned to the temporary National Economic Committee.

Q. What happened after the five years?

[fol. 2849] A. I was sort of drafted for the administrative section of the department, another division, and I spent probably 12 or 13 years as an administrative officer for the——

Q. What did you do there?

A. Well, I was in charge of all the housekeeping chores of the division, principally for the budget, the finances of the division, the non-professional personnel, under the supervision of the administrative agency; just a ramification of duties that we seemed to take all the duties that did not belong to the legal section.

Q. During that period of time, then, you did no investigation nor statistical work for the division; is that correct?

A. Only in connection with the budget.

Q. It was purely a housekeeping aspect?

A. That's right, sir.

Q. That account——

The Court: Let me ask you this, Mr. Finn: during that period, did you have under your supervision gentlemen who were called experts or business economists or held titles of that nature?

The Witness: Not while I was in the administrative [fol. 2850] —an administrative officer.

The Court: You did not supervise that work?

The Witness: Not the type of professional personnel that you speak of.

The Court: All right.

The Witness: No, sir.

By Mr. Johnson:

Q. Then, after that, did you become a business economist?

A. Yes, I did.

Q. And when was that?

A. It was about 19—the latter half of 1955.

Q. And that is the work you have been doing since?

A. That's correct, sir.

Q. What did you do, sir, before you joined the Department of Justice?

A. I was employed in an ice cream company.

Q. In Washington, D.C.?

A. In Washington, D.C.

Q. Were you doing accounting or statistical work there?

A. Yes.

Q. Which?

[fol. 2851] A. Statistical work.

Q. Statistical work?

A. Yes.

Q. Did you take formal statistics courses in school?

A. I didn't major in statistics, no, sir.

Q. Did you take any statistics courses?

A. Yes, I did.

Q. Do you remember what textbook you used?

A. No, I do not.

Q. When did you take such a course?

A. 1932, '33.

The Court: Where did you say that you got your university level or college level education?

The Witness: I got it at the school that was then called Columbus University in Washington, D.C., which is now, as I understand, a part of the Catholic University. It is no longer in existence.

Q. Have you ever had anything published in the field of statistical analysis?

A. No, I have not.

Q. Are you a member of any professional statistical association or society?

A. No, I am not.

[fol. 2852] Q. Mr. Finn, are you familiar with a little

book by Darell Hough entitled "How to Lie with Statistics"?

A. I have heard of it.

The Court: How to what?

Mr. Johnson: "How to Lie with Statistics."

Q. Whether you are familiar with it or not, will you agree with me that in the handling of statistics, it is often possible to get different results from the same set of statistics?

A. A different interpretation of them, yes, sir.

Q. And do you know that professional statisticians have developed a body of disciplines that attempt to make the presentation of statistics less misleading?

A. I don't know that.

Q. You are not familiar with the statistical disciplines whatsoever; is that right?

A. That's right.

Q. So you are saying that you never heard of the problem of full disclosure in captions on tables; is that what you are saying?

A. Irrespective of whether I have heard of it or not, that is what I always attempted to do.

[fol. 2853] Q. So you know—

A. To give a clear and concise caption at the top of the table.

Q. So you know of the problem, then?

A. Yes.

Q. Do you know that rules have been developed with respect to full disclosure of sources of tables?

A. There perhaps are. I have never read anything on the subject particularly, but any time that I make a table up I try to give, there again, a clear and concise source of the table.

Q. Do you know that standards have been developed with respect to the full disclosure of all adjustments made in statistical tables?

A. There perhaps are. I am not familiar with that.

Mr. Handler: Will the witness speak up, your Honor. It is awfully hard to hear.

The Court: Yes. Will you talk up, Mr. Finn.

Q. And will you agree with me that if a full disclosure of adjustments is made, the tables can be misleading?

Mr. McManus: I object, your Honor. This is getting a [fol. 2854] little far afield, and that is such a general statement that I object as to form.

Now, if Mr. Johnson could be a little more specific I would have no objection, but that is like asking how far does the sun shine.

The Court: Well, I don't know if he is in a position to disagree or not.

Mr. McManus: I am not sure that anyone is in a position to understand it, your Honor. That is why I object. It is so broad in form.

The Court: Let me say to the witness right now that if at any point he doesn't understand a question or feels unable to answer it directly, he may say so.

Mr. Johnson: I withdraw the question.

By Mr. Johnson:

Q. Do you know that professional statisticians have developed rules with respect to consistency in comparisons, so as to avoid comparing dissimilar items?

A. I don't know.

Q. Do you know that rules have been developed with respect to the consistency and definitions of universals use?

A. I don't know that.

[fol. 2855] Q. When you prepared these tables, you intended that the Court should rely on them, did you not?

A. Yes, I did.

Q. And you did not intend that the Court should go back into the background material and determine for himself what you had done, did you?

A. No. As I mentioned earlier, I tried to make the tables as clear and as concise as possible.

Q. When did you start preparing these tables?

A. I don't remember the date.

Q. Do you remember the year?

A. It was after receipt of the material from GCMI.

Q. You don't remember what year that was?

A. No, sir.

Q. Was it as much as two years ago, three years ago?

A. I don't remember the date.

Q. You just don't remember. Did you prepare all of these tables yourself?

A. I had assistance on it.

Q. Who assisted you?

A. A statistical clerk we have in the section.

Q. One clerk?

[fol. 2856] A. One clerk.

Q. You and one clerk prepared all of it; is that correct?

A. Oh, from time to time we had temporary help.

Q. Who asked you to prepare it?

A. Mr. McManus.

Q. What were your instructions?

A. Well, I didn't particularly get instructions.

Q. What were you told to do?

A. To prepare these tables and show the can and market shipments, and the combined shipments of both. Also the—

[fol. 2857] Q. Of both what?

A. Of cans and glass, and the breakdown of the east-west market of cans and glass, and consolidation of those. Also, the tabulations that are found in folder C.

Q. Were you told, in words or substance, that you were to try to get Continental Can's share as high as possible?

A. No, sir; I was not.

Q. Did you try to get it as high as possible in the preparation of these charts?

A. High as possible? I used the figures as I found them.

Q. You used them just cold, without paying any attention to what the results would be; is that correct?

A. We—we didn't alter the figures any to get any higher percentage.

Q. Did you select figures to get higher percentage?

Mr. McManus: Your Honor, I object to that. I don't know how you can select figures to get any different percentages than what they are. I always thought 2 and 2 added up to 4 and 4 and 4 added up to 8. He said he didn't alter the figures.

[fol. 2858] The Court: But 4 and 2 add up to 6.

Mr. McManus: That is correct, but there has been no

showing he made any arbitrary selection. He is asking him if he has changed them around.

The Court: Mr. McManus, that is what Mr. Johnson, I presume, is getting at, whether he made any arbitrary selection or exclusion of given items which might affect the result.

Isn't that what you are asking?

Mr. Johnson: Yes, sir.

Mr. McManus: Your Honor, I can understand that on specifics, if he wants to ask about specific tables, on that I have no objection, but you ask a man who has prepared a hundred tables if he has arbitrarily excluded—

The Court: Mr. McManus, this gentleman is an expert witness, or offered by the government as an expert witness, on the question of the preparation of these statistics.

Mr. McManus: That is correct; in preparation of these statistics.

The Court: He is not a witness who is likely to be trapped, and if any witness in my court is likely to be trapped I am probably not going to let him be trapped. He is an intelligent [fol. 2859] witness. He can take care of himself. If he can't answer the question I am sure he will say so. If he can answer it, I would like him to.

Mr. McManus: All right, sir.

The Court: I will overrule the objection.

Mr. Johnson: Would you read the question to the witness?

(Question read.)

A. I didn't alter the figures at all to get the percentage.

Q. You said that. I asked you if you selected the figures to get a higher percentage?

A. I don't know how to interpret your question, particularly the word "select."

Q. You are saying now that you can't answer that question; is that right?

A. That's right.

Q. Were you asked to get figures relating to California, figures of any kind relating to California?

A. Yes, we attempted to.

Q. What did you do to get those figures, or in an attempt to get those figures?

A. We couldn't get them out of the Bureau of Census.
[fol. 2860] Q. What did you try to get from the Bureau of Census?

A. We tried to get the shipments of metal cans and shipments of containers on California.

Q. How long did you spend in this project?

A. Well, we spent some little time. We never gave up.

Q. But the end result of your effort was that you did not get any material on California; is that correct?

A. That's right, sir.

Q. Did you try to get separate statistics relating to hermetically sealed heat sterilized food?

The Court: I didn't get that last. Is it hermetically sealed what?

Mr. Johnson: Hermetically sealed heat sterilized food.

A. Yes, we made a lot of efforts in that direction.

Q. Just what did you do?

A. Oh, we sort of investigated about every source we could think of.

Q. What were the sources you could think of?

[fol. 2861] A. Well, principally, it was in the National Canners Association, we had the discussions with them. I talked on the phone with them quite a bit. We—there again we tried to get the material out of Census. They had none. There were any numerous sources. We even tried to—I don't recall what other organization we tried to get material out of, but it was—we made every effort.

Q. You finally concluded that there were no such figures to be had; is that correct?

A. That's right—not to my knowledge.

Q. And you concluded that after this extensive investigation that you have described?

A. Yes, sir.

Q. Did you try to get any figures relating to frozen food containers?

A. No, I did not.

Q. Why didn't you?

A. I was only concerned with cans and glass.

Q. I see. Your instructions specifically excluded everything except cans and glass; is that correct? And I should add the closures to which you have referred in your tables?

A. Yes, after our conversations on the staff level, my [fol. 2862] instructions were to prepare the cans and glass statistics.

Q. So you never tried to get any statistics on anything other than cans and glass and the closure material; is that right?

A. Well, let me say this: We sort of explored everything about Continental Can that we could.

Q. Did you try to get figures for rigid aluminum foil containers?

A. No, we didn't.

Q. Did you try to get figures for folding boxes for food?

A. I don't recall whether we got that information through a set of interrogatories or not.

Q. And if I understand you correctly, you made no attempt to get information relating to containers for frozen food; is that correct?

A. That's right.

Q. Will you turn your attention, Mr. Finn, to table 3C?

A. What folder?

Q. 3C.

The Court: You are now referring to folder C?

Mr. Johnson: It is page 4 in 803.

[fol. 2863] The Court: 803, yes. All right, I have it. It is entitled "1956 production and shipments of vacuum, screw thread," and so forth.

Mr. Johnson: Yes, that is the one.

The Court: All right.

Q. I understand from the caption on that table, Mr. Finn, that that is limited to closures made from tin mill products; is that correct?

A. Yes, sir.

Q. Why was it so limited?

A. Well, in these years 1956 and '57, the top sealed vacuum closures with a lug thread were included with the vacuum type caps.

Q. Yes, I realize that.

A. Yes.

Q. My question was—

A. Well, I was attempting to compare the White Cap production and shipments and Hazel-Atlas to what was shipped by the entire industry that made tin mill products.

Q. What did you understand was meant by "tin mill products"?

A. Well, closures made out of tin, as commonly known.

[fol. 2864] By the Court:

Q. Well, now, wait a minute. What do you say tin is commonly known as, tin plate?

A. Tin plate; and they have—I don't know whether black plate is used to make closures or not, but there are—

Q. Black plate would have been included as a product of a tin plate mill?

A. That's right.

Q. When you say "tin mill products," you really mean tin plate mill products; is that right?

A. That's right, sir.

Mr. Johnson: Will you mark that for identification, please?

(Marked Defendants' Exhibit U for identification.)

Mr. McManus: Do you have another copy?

Mr. Johnson: No, I don't.

Mr. McManus: Could you tell me, are you going to refer to one specific part or all?

Mr. Johnson: I will refer to several parts of it.

Mr. McManus: Well, your Honor, I don't know how I am going to follow it. He has got a thousand figures on that [fol. 2865] thing. Doesn't he have another copy? I always thought we were supposed to have two copies when we were going to discuss exhibits.

The Court: That is right.

Mr. McManus: Two copies of every one.

The Court: That is what I thought.

Mr. Johnson: Let me say that this is indicated as a source material for this chart, and I would have assumed—

The Court: Is it? Let me see what it is.

Mr. McManus: Your Honor, we have no objection to it. I just need a copy.

Mr. Johnson: Well, I would assume that the government would have available the source material here. They knew this cross-examination was coming on.

Mr. McManus: We obviously do, your Honor. But—

The Court: Well, isn't this referred to, "U. S. totals for Department of Commerce, Bureau of Census, series M34H-07"? That is referred to right on the chart.

Mr. McManus: That's right, your Honor. All I am asking for, will he give us a copy or will he give us time to get [fol. 2866] our own copy?

The Court: Where is your own copy?

Mr. McManus: Probably in the back.

The Court: Have you got a copy here?

Mr. Tolton: I think we have one.

The Court: All right, let's have one.

Mr. Johnson: This problem will keep on arising.

The Court: In other words, it may be your intention, Mr. Johnson, to refer to any of the source material that is described here.

Mr. Johnson: Yes, sir.

Mr. McManus: All right.

The Court: And Mr. McManus should be prepared to have that source material available.

Mr. McManus: All right, sir.

The Court: All right.

By Mr. Johnson:

Q. Is this document, Defendants' Exhibit U for identification, the document referred to as the source for this table 3C?

A. Yes, it is.

Q. Now, your table 3C shows a line "total U. S.," does it not?

[fol. 2867] A. Yes, it does.

Q. Now, is that total the sum of lines 4 and 9 of the Facts for Industry Report, which I showed you, which is Defendants' U for identification?

A. What year are you speaking of?

Q. Either '56 or '57. Let's look at '57. It is line 4.

A. Line 4.

Q. It is entitled "tin mill products," is it not?

A. That's right.

Q. And line 9 is entitled "vacuum friction types."

A. That's right.

Q. And that total then for 1957 is the sum of lines 4 and 9; is that correct?

A. That's right.

Q. And it does not include anything referred to in line 5, which is headed "aluminum," is that correct?

A. That's right.

Q. Does not include anything that is referred to in line 10, "other types," is that correct?

A. That's right, sir.

Q. Does not include anything that is referred to in line 13, "molded plastic caps"?..

A. That's right, sir.

[fol. 2868] Q. Does not include anything that is included in line 18, "milk bottle closures," is that correct?

A. That is correct, sir.

Q. Does not include anything that is referred to in line 24 as "home canning closures for glass containers," is that correct?

A. That is correct, sir.

Q. Why did you select those two lines?

A. For the comparability of the tabulation.

Q. Comparability of what?

A. In comparing the closures of White Cap and Hazel-Atlas to the total U. S.

Q. Why did you think they were comparable?

A. Well, we—White Cap, we understand, did not make any of these other types that you have been mentioning here.

Q. You understood that; is that correct?

A. Yes, sir.

Q. Did you know? Had you made inquiry as to whether they did or did not?

A. Well, I think perhaps in all of this document somewhere we had that information.

Q. How about Hazel-Atlas? Did it make any of those?

[fol. 2869] A. We knew that Hazel-Atlas made screw lug types.

Q. Did you know that in the Census reports, to which you refer in your footnote, that Hazel-Atlas had reported aluminum closures?

A. Had reported—no, I did not.

Q. Did you know that in those Census reports, to which

you refer, that Hazel-Atlas had reported home canning closures, I might say in large quantities?

A. You speak of home canning closures?

Q. Yes, sir.

A. As distinguished from tin mill products and what other products?

Q. Home canning closures, as referred to in this Facts for Industry on line 24.

By the Court:

Q. What do you understand "home canning closures" includes in Facts for Industry?

A. Well, home canning closures are largely made of tin mill products. I presume they are made of others.

Q. Those would be the screw on tops for various types of home canning jars; is that right?

A. That's right, sir.

[fol. 2870] Q. Are there any other types included within the home canning closures there, that you are aware of, besides the screw on tops?

A. I think Hazel-Atlas made some out of some different type of metal. I am not too sure about it.

By Mr. Johnson:

Q. Now, why did you exclude from your table plastic closures?

A. Well, plastic closures, from the information we had, were not made by White Cap or Hazel-Atlas.

Q. So you were trying only to relate this to the closures made by White Cap or Hazel-Atlas; is that what you are saying?

A. That's right.

Q. So when you have on your table 3C a per cent of U. S. total, and you give a figure for 1957 of 20.6 per cent, that per cent is nothing except of the parts that are made by Hazel-Atlas and White Cap?

A. That is correct, sir.

Q. So that percentage has no relation to the total United States production of closures; is that correct?

A. That's right.

Q. And is it not fair to say, sir, that you have arbitrarily

[fol. 2871] excluded from this table plastic closures, milk bottle caps, home canning closures, all of these other things except lines 4 and 9 only?

A. We have excluded those items. We made only comparison with tin mill products.

By the Court:

Q. Did you exclude them arbitrarily?

Mr. Handler: Exclude what?

The Court: "Arbitrarily," I think was the phrase in the question.

Q. Did you exclude them arbitrarily or not?

A. We made this chart for comparability of comparisons.

By Mr. Johnson:

Q. Well, having excluded all of those other things, what do you think this chart shows?

A. This chart gives you an idea of the volume of closures made from tin mill products that Continental now enjoys.

Q. Now, in table 4C, the following table, you have made similar selections, have you not?

A. Yes, sir.

Q. As I understand it, on table 3C you added together screw thread and lug types and vacuum types, but you [fol. 2872] didn't add them together on 4C, is that correct?

A. That's right, sir.

By the Court:

Q. Let me ask you this, Mr. Witness: The phrase or the line in 4C, which is "U. S. production and shipments of vacuum type closures," what relationship does that line, regardless of year, bear to the figure "total U. S." on chart 3C?

A. Your Honor, in 1956 and 1957 the Bureau of Census lumped together all the top seal vacuum closures, the lug thread and various other types. In 1958 they changed their method to include merely the vacuum type closures. They eliminated or placed in some other category the lug thread and screw threads. So that for '58 we were able to

get a better figure for the vacuum type closures, and in making comparison between U. S. total and White Cap.

Q. Well, if you are going to make chart 4C project-chart 3C into chart 4C, why are there available in the Bureau of Census, Facts for Industry, that you used here, the figures on screw thread and lug types made from tin mill products for the year 1958?

A. Your Honor, I think on line 3 here we have U. S. production shipments of screw thread and lug type closures."

[fol. 2873] Q. I see. All right.

A. The top figure, the "U. S. production and shipment of vacuum type closures," have been—are recorded separately in this particular year.

Q. So here you compare the White Cap production under "vacuum type tin mill products" with the total U. S. production and shipment of all vacuum type closures, and you compare the Hazel-Atlas with screw thread and lug type closures, tin mill products, total U. S. production; is that right?

A. That is correct.

By Mr. Johnson:

Q. And that is all you do in that table, is it not, in those percentages?

A. I didn't understand your question.

Q. And that is all you do, that is it. The percentage reported for White Cap under that table is simply a total of the amounts reported on line 9, that is, under the heading "vacuum cap," in Facts for Industry?

A. That's right, sir.

Q. And the heading, Hazel-Atlas percentage and U. S. total is simply the percentage referred to in line 4, that is, [fol. 2874] screw thread and lug tin mill products, is it not?

A. That's right.

Q. And if you had added any of the other different types of closures, referred to in this Facts for Industry, you would have gotten different percentages, wouldn't you?

A. That's right.

The Court: All right, Mr. Johnson, have you completed your examination on these two exhibits?

Mr. Johnson: I have one detail question I want to ask him. Then I will be through.

The Court: Well, I think we will take a brief recess at this point.

(Short recess)

[fol. 2875] Q. Mr. Finn, would you look at table 3 C again, right in the middle of the page. There is White Cap Company, and following that are figures, and then there is another line "Reported under vacuum (friction) type."

A. Yes, sir.

Q. Do you know what that second—what the figures on the second line represent?

A. Second line?

Q. The line that says "Reported under vacuum (friction) type."

A. That is terminology from that report that they found in the Bureau of the Census.

Q. But as far as you know, both of those lines represent vacuum closures, do they not?

A. Yes, I think that's correct.

Mr. McManus: Excuse me. I would like to object to the form. Both of what lines? Would you state specifically?

Mr. Johnson: The line that is captioned "White Cap Company" and the line that is captioned "Reported under vacuum (friction) type."

The Court: In other words, the figure for 1956 production, 460,597, without any explanatory words, and 1,747,483, [fol. 2876] "Reported under vacuum (friction) type"; is that right?

Mr. Johnson: Yes, sir.

By Mr. Johnson:

Q. Do you know the difference between the various types of closures that are referred to in this Facts for Industry bulletin?

A. I have a general knowledge, sir, which I gained from working on the case. I am not a real technician.

Q. You say you are not a real technician?

A. I am not a technician.

Q. Do you have any background in closure manufacture at all?

A. I didn't get the first part of the—

Q. Do you have any background in closure manufacture?

A. No, I do not.

Q. Or selling closures?

A. No, sir.

Q. Or cans?

A. No, sir.

Q. Or glass containers?

A. No, sir.

[fol. 2877] Q. Did you notice the physical exhibits that Mr. Danbom produced here the other day, those that were on the table here for several days?

A. I did.

The Court: They are still here, in the bookshelves.

Q. Those that are in the cabinet?

A. Yes, sir.

Q. Did you by any chance notice that the majority of those containers which have screw type closures on them were closed with plastic containers?

A. I didn't take particular notice of that—

Mr. Handler: Pardon me, plastic closures.

Mr. Johnson: Yes.

Q. You had not noticed that, had you?

A. I didn't take particular notice of it.

Q. Would you turn, Mr. Finn, to section 1 of folder A, the caption of that table. What do you mean by "shipments"?

A. Shipments generally mean completed sales or—and would include perhaps in some instances consignment sales or, in the glass industry, it generally means that when it is shipped from a plant to the warehouse.

Q. You think it does include shipments from plants to [fol. 2878] warehouses; is that right?

A. I think it does.

Q. Do you know whether it does?

A. I am not too clear on it, no, sir. I don't recall at the present time.

Q. Does it include exports?

A. We have tried to exclude exports.

Q. Have you excluded them from this table?

A. To the best of our knowledge, we have excluded them, yes.

Q. So you think they are excluded from this table; is that your answer?

A. Yes, sir.

Q. In the caption of that table, you refer to leading manufacturers.

A. Yes, sir.

Q. When you say "leading manufacturers," do you mean leading in assets?

A. No. As used here it would mean the amount that the leading manufacturers of glass containers—the volume of glass containers.

The Court: The volume of production?

The Witness: The volume of production, the volume of shipments. Either one.

[fol. 2879] Q. So it doesn't mean dollar sales?

A. No, it doesn't.

Q. And it doesn't mean in assets?

A. No, sir.

Q. Now, sir, would you tell me which company you regard as the fourth leading manufacturer in the industry as you have defined it?

A. The fourth leading.

Q. Yes. You have listed here three. Could you give me the fourth?

Mr. McManus: Your Honor, I would object to that. We are going way beyond the scope of the tables. I am sure that Mr. Finn has other data that he could probably produce which would show, or at least attempt to show, what is the fourth.

The Court: It seems to me, Mr. McManus, that if you have selected three manufacturers here, Owens, Anchor and Hazel-Atlas, it is perfectly legitimate cross examination to find out what he considers the fourth. I will overrule the objection.

A. I think it is perhaps Knox. I might add one other company that is near Knox, and through the years they have sort of been jockeying back and forth between who is fourth and who is fifth.

[fol. 2880] Q. What company is that?

A. I wouldn't be too sure, but I think it is Brockway.

Q. Where did you get your information as to which were the leading companies as you have defined it?

A. From GCMI, the statistical data we obtained from them.

Q. From GCMI itself; is that correct?

A. That's right.

Q. No other source?

A. No, sir. If I may add, the word "leading" is my terminology.

Q. I appreciate that it is your terminology.

Now, what did you intend his Honor to gain, what impression did you intend him to gain, from the use of that term?

A. I didn't—I had to use something in the titles, and I picked this.

The Court: Your definition of "leading" as used in this chart, 1 A: Largest in terms of volume, of production? Would that be your definition of "leading"?

The Witness: Yes, a combination of production and ship-
[fol. 2881] ments.

Q. A combination of them; is that what you say?

A. Yes, sir.

Q. When you saw the figures from GCMI on which you based your decision as to what you thought were the leading manufacturers, did you see any figures for Wheaton Glass Company?

A. No, Wheaton doesn't report to GCMI.

Q. Did you see any figures for Armstrong Cork Company?

A. No; they don't either.

Q. Do you have any idea whether Wheaton Glass Company or Armstrong Cork Company is as large as or larger than any of the three companies named here?

A. Well, from our study and general knowledge of the industry that we were able to gain and what we have read about it, we felt that Armstrong—neither Armstrong nor Wheaton were as big as the three I have included here.

Q. So your decision to name these three, then, was based on your feeling; is that correct?

A. My general knowledge.

Q. You have never seen any figures of Wheaton or Armstrong, have you?

[fol. 2882] A. Production figures on glass containers, no, I have not.

Q. So, except for your feeling about them, you have no information as to whether or not they are larger or as large as any of the three companies named here; is that correct?

A. I have never seen any figures on Wheaton or Armstrong, no, sir.

Q. Does the number of containers sold by a company in any way reflect the size of the containers?

A. No, sir.

Q. Does it in any way reflect the dollar volume of containers sold?

A. These tabulations do not reflect any dollars.

Q. You have a line here "All other manufacturers." Do you know how many other companies are included in that caption?

A. Not precisely. I would say between 35 and 38.

Q. That would be your estimate; is that right?

A. That is my estimate.

Q. From your work in this case. You base your estimate on your work in this case?

A. That is right.

[fol. 2883] Q. Going back to Armstrong and Wheaton, did you ever look at the material furnished to the Department of Justice by Embart Manufacturing Company and introduced here in June?

A. Oh, I probably did look at it, yes.

Q. You did not observe that Armstrong and Wheaton were among the larger in terms of number of glass manufacturing machines of Embart make?

The Court: That what?

Mr. Johnson: That they are larger in terms of the number of machines, forming machines.

Mr. McManus: Your Honor, I would like to object to that question, and to another question asked, since in a number of questions here Mr. Johnson is assuming facts not proven. And in this question, I object to the form. He talks about larger. I don't know if he means the size of

the machine or number of the machines, and I think the question is totally unclear and ambiguous.

The Court: I think I would reframe it, Mr. Johnson.

Mr. Johnson: All right.

Q. Did you know that the material submitted by Embart Manufacturing Company to the Department of Justice [fol. 2884] showed that Armstrong was the fourth in the number of IS sections, glass container machines, and that Wheaton was the fifth?

A. I took no particular notice of that, no, sir.

Q. So that you did not consider that at all in determining which were the leading companies?

A. No, I didn't, for this reason: I couldn't tell from that document how many of these machines were in actual operation.

Q. Nor how much they produced?

A. Nor could you tell the production efficiency of those machines. So I did not consider it at all.

Q. Looking at the line headed "All other manufacturers," in the percentage reported of 45.8 for 1957, can you tell how much of that percentage is accounted for by the fourth leading company as you have defined it?

A. The fourth company?

Q. Yes.

A. Not precisely, but I would say roughly about 5 per cent.

Q. On what do you base that estimate?

A. I am thinking in terms of Knox Glass.

Q. ~~You~~ are thinking of Knox. You are not thinking of [fol. 2885] Armstrong or Wheaton?

A. No, sir.

Q. Are Armstrong and Wheaton included in that "All other manufacturers"?

A. Presumably they are, because that figure there is the difference between the total U. S. and the three companies I have listed here.

Q. Now, you used the term "All types of glass containers." What do you mean by that? What does it include?

A. It includes all of those in the categories that are published by the Bureau of the Census.

Q. Does it include vials?

A. I don't think it does include vials.

Q. Are Kimble Glass Company's figures included with those of Owens-Illinois?

A. I have no way of telling whether a subsidiary of Owens like Kimble is included in the report that they make to the GCMI.

Q. You just plain don't know?

A. Presumably—I have no way of telling, no, sir.

The Court: Do you know whether or not Kimble made a separate report to GCMI?

[fol. 2886] The Witness: I do not know, sir.

By Mr. Johnson:

Q. Are packaged tumblers included in your category "All types of glass containers"?

A. Yes, sir.

Q. Are re-use tumblers included?

A. Re-used?

Q. Re-use tumblers.

A. You mean the initial manufacture of a tumbler?

Q. Yes, sir.

A. They are, too.

Q. Home canning containers; are they included?

A. Yes, sir.

Q. Are carboys included?

A. I presume they are. I have no knowledge as to all types of containers that are reported to GCMI by the various manufacturers.

Q. Again, you just don't know; is that correct?

A. That's right.

Q. Are salt and pepper shakers included?

A. I don't know.

Q. Is scientific glassware, such as Erlenmeyer flasks, included?

[fol. 2887] A. I don't know.

Q. Are glass piggy banks included?

A. I don't know.

The Court: Glass what?

Mr. Johnson: Piggy banks.

The Court: Piggy banks.

Q. Are wine and liquor decanters included?

A. As distinguished from wine and liquor bottles, sir?

Q. Yes.

A. I don't know that.

Q. Are nursing bottles included?

A. I presume they are.

Q. Again you don't know?

A. I don't know.

Q. Would you turn, sir, to table 1 B, the next table? Apparently something is omitted from this table that is in the preceding one; is that correct?

A. Yes, sir.

Q. What has been omitted?

A. Omitted from this table are wine and liquor bottles.

Q. You don't call wine and liquor bottles beverage glass [fol. 2888] containers; is that right?

A. They are in a separate category.

Q. Why were they excluded from this table?

A. There wasn't—well, they are included in the preceding table.

Q. They are included in the preceding table?

A. That's right.

Q. Why were they left out of this one?

A. Well, this table is a consolidation of the food, non-food, beer and beverage category.

Q. Yes, that's what it says.

By the Court:

Q. Let me ask you this: What is the significance of food as you understand it, food, non-food, beer and beverage, with wine bottles and liquor bottles excluded?

A. Your Honor, this table here is merely a consolidation of the food, non-food, beer and beverage tables.

Q. You did that because that is what you were told to do; is that right?

A. I did that because I thought it would be clear to understand this entire tabulation if I had a total in here for the food, non-food, beer and beverage.

[fol. 2889] Q. Well, let me ask you this: Presumably, then, on the first line on-table 1 A, if you deduct the first

line on table 1 B from table 1 A, you get the number of wine and liquor bottles; is that correct?

A. That's right.

Q. Which would amount to roughly 2,120,000-odd; is that right?

A. That's correct.

Q. Not two million. Two billion.

A. Two billion.

Mr. Johnson: I don't know if I still have an answer to my question.

By Mr. Johnson:

Q. Why did you exclude liquor and wine from this table?

A. Well, it ties into other tables that we have in there, and they are in the metal can field. There are no items of cans.

Q. Oh, that is the reason why you exclude them; is that right?

A. That's right.

Q. Did you leave out milk bottles?

A. No, milk bottles are there.

[fol. 2890] Q. Are there milk bottles included in this table 1 B?

A. Milk bottles are in table 1 B.

Q. Are catsup bottles in 1 B?

A. Catsup bottles are in 1 B.

Q. Are toiletries and cosmetics containers in 1 B?

A. They are in 1 B too.

Q. So you left out liquor and wine but included these others; is that correct?

A. Liquor and wine are left out of 1 B but are included in 1 A.

Q. Do you know what the purpose of table 1 B is?

A. I think I mentioned it. It is merely a consolidation of the tables which follow.

Q. Why is it offered? Perhaps I should address that question to counsel, why it is offered.

The Court: I think that is a question that is addressed to counsel and not the witness. It is not the witness' func-

tion to testify as to why it is offered. If you want to ask Mr. McManus, you may ask him.

Mr. Johnson: May I ask Mr. McManus?

The Court: Surely.

[fols. 2891-2892] Mr. McManus: Your Honor, as I testified here before—"I did not testify—as I outlined before in our case, we admitted that whiskey is not sold in a metal container. Actually I said that it is against the law to do it. Frankly, I am wrong. But we are still sticking by that statement of mine that there is no whiskey sold in metal containers. The law does not specifically say you can't, but to our knowledge there has never been any whiskey sold, legal whiskey, I should say, your Honor, in metal containers.

There is probably a lot of white lightning, with which I am somewhat familiar, being from the South, sold in metal containers. That is the reason we excluded it and that is the reason we excluded the alcoholic beverages, including wine.

Now, in the other areas here, food, non-food and beverages, we argue that these products are in competition with metal cans. That is the reason we excluded wine and liquor.

The Court: All right, then, Mr. Johnson. We will take a recess at this point until a quarter after 2. We will check at that time.

(Recess taken until 2:15 p.m.)

[fol. 2893]

AFTERNOON SESSION

2:25 P.M.

LEO V. FINN resumed.

Cross-examination Continued.

By Mr. Johnson:

Q. Just before lunch, Mr. Finn, we were talking about table 1B. I think you said that you had eliminated wines and liquors from this table because you regarded them as not interchangeable with metal containers; is that right?

A. Yes, that's right.

Q. And you also said that you had included containers for fresh milk in this table; is that correct?

A. Yes, sir; that's right.

Q. Would you tell me what container, what metal container, you regard as interchangeable with a glass container for fresh milk?

A. Well, perhaps there isn't any. We put all of the items, food for human consumption, in the food category.

Q. Does that complete your answer?

A. Yes, sir.

Q. Do you know of any estimate as to what per cent of all glass containers made in the United States are [fol. 2894] made for wine and liquor?

A. What per cent?

Q. Yes.

A. Offhand, I don't know, sir.

Q. Looking at table 1C, this table, I understand from your heading, is designed to include all glass food containers; is that correct?

A. Yes, sir.

Q. And this table is not limited to containers for products that are heat sterilized, is it?

A. No, sir.

Q. And it is not limited to containers for products that are vacuum sealed, is it?

A. No, sir.

Q. Are home canning containers included in this table?

A. Yes, they are.

Q. Do you know of any metal container that is interchangeable with home canning containers?

A. No, I do not, sir.

Q. Look at table D. Here, if I understand correctly what you have done, you have added together both returnable and non-returnable beer bottles; is that correct?

[fol. 2895] A. That is correct, sir.

Q. Does the Bureau of Census add those types of containers together?

A. No, they are reported in separate categories.

Q. If I understand the effect of this table, you are adding together bottles which are used only once with bottles which are used 20 or 25 or more times; is that correct?

A. That is correct.

Q. And the total of those bottles would be two, one bottle used once will count for one total?

A. That's right.

Q. And the bottle that is used 25 or more times will count for one, will it not?

A. That's right.

[fol. 2896] Q. And on table 1 E, on the following page, you have done the same thing, haven't you?

A. The same thing, yes.

Q. Does the Bureau of the Census do this?

A. No. They have two categories.

Q. Now, you called this "beverage containers." What do you include in the term "beverage containers"?

A. Well, it is principally soft drinks.

Q. Anything else?

A. Carbonated and non-carbonated beverages.

Q. Water?

A. Carbonated water?

Q. No; just plain drinking water.

A. Plain drinking water? I have never seen any plain drinking water.

Q. You have never seen plain drinking water sold in a glass container?

A. In a beverage container?

Q. In any glass container.

A. We are speaking of beverage containers, aren't we.

Q. My question, sir, is drinking water, sold in glass containers included in your table E?

A. I have seen them in carboys yes.

[fol. 2897] Q. Would they be included in your table 1 E, whether they are gallons or half gallons or carboys or what?

A. Oh, I don't know the size, sir.

Q. Are they included?

A. I don't know.

Q. How about apple juice?

A. Apple—

Q. Is that included in your table 1 E?

A. I don't know.

Q. Grape juice?

A. I don't know that.

Q. Now, looking at table 1 F: does that table contain

everything that is left after you have taken out, 1 C, 1 D, 1 E and wine and liquor?

Mr. McManus: Your Honor, I would like to object to this question only on this ground: I think the source data indicates what it includes, and I object to having to call on the witness' memory, if it excludes something that may or may not be in there.

The Court: Overruled.

The Witness: Could I have the question?

Mr. Johnson: Would you read it, please.

(Question read.)

[fol. 2898] A. 1 F is all non-food glass containers. Yes, sir, that is exclusive of those preceding tables.

Q. Would you turn now to folder B—I am sorry. I want you to go instead to section 2 of folder A. That will be the table following the one we were last looking at.

A. Yes.

Q. Table 2 A—

The Court: I may say, for the benefit of counsel for American Can, that the secondnd section of A deals with metal cans and the figures concern your client.

Mr. Austern: Thank you, your Honor. That was the table, I believe, we were privileged, Mr. Goldberg and I, to look at on Thursday. And, with your Honor's permission, if I can look at it again, it would be helpful.

Mr. McManus: Could he come down here for the moment and sit with us, your Honor?

Mr. Handler: I will sit with him.

By Mr. Johnson:

Q. The caption in table 2 A B refers to all types of metal containers. What do you mean, sir, by "metal containers"?

[fol. 2899] A. I mean by "metal containers" what is spelled out in the Facts For Industry. I just forget the exact wording, but it is a metal container that is less than, I think it is, 28 gauge tin.

Q. Does it include aluminum containers?

A. No, it does not.

Q. Does it include metal collapsible tubes?

Q. No, sir.

Q. Does it include pails?

A. Pails?

Q. Yes.

A. Some types of pails.

Q. Is there any limit on the size of the container that is included in this table?

A. I don't believe there is. Well, I withdraw that. I am not—I don't know, sir.

Q. You mean there is no way that we can tell from this term "metal containers" what you included within it; is that right?

A. Are you speaking about size?

Q. About anything. You have said it does not include aluminum. Does it include any other type of metal container?

A. Well, I don't think it includes a heavy gauge steel [fol. 2900] container.

The Court: You mean steel drums?

The Witness: Steel drums.

Q. It does not include steel drums?

A. No, sir.

Q. When you say "metal containers," you mean something, but it is not clear from the table what you mean; is that right?

A. Well, it is the generally accepted type of container that is mentioned in the Facts for Industry.

Q. Generally accepted by whom?

A. I presume within the industry.

Q. Would you expect that his Honor would determine that from the fact of this table?

A. No, not from this document, sir. Perhaps from the underlying data, though, the source material.

Q. And I think you said this morning, in answer to my question, that you would not expect his Honor to go back and examine the underlying material, didn't you?

A. I don't recall that.

Q. Are captive manufacturers included in this table?

A. In the totals, yes, sir.

[fol. 2900a] Q. Captive manufacturers are included?

A. Yes, sir.

Q. Now, in the heading of this table you refer to leading manufacturers in the industry, and I suppose by "the industry" you mean whatever this concept of metal containers is; is that right?

A. That's right.

[fol. 2901] Q. And since the term "metal containers" isn't clear, why, we can't tell any more than that what the industry is that you're talking about?

A. Well, as I mentioned before, the Bureau of Census defined somewhat the industry is.

Q. This table doesn't even say that it is taken from the Bureau of Census' definition of the industry, does it?

A. No, sir.

Q. Now you refer to the leading manufacturers. You name three companies. How do you determine that those were the leading manufacturers in whatever this industry is?

A. Well, one, it is generally accepted knowledge in thinking that American Can, Continental and National Can are the three leading manufacturers in the industry.

Q. And that is all you have to go by, is some generally accepted knowledge?

A. Well, there is a lot of writing, been a lot of writing on it, yes, sir.

Mr. McManus: Your Honor, I hope now that the defendant is not going to cross-examine Mr. Finn on things that he has already answered in his answer to the government's complaint, in which he admits that Continental [fol. 2902] is the second largest producer of metal cans in this country.

Q. You have nothing other than what you call "generally accepted knowledge" to determine what are the leading companies in this industry that you are talking about?

A. That's right.

Q. Do you know how large, in terms of volume of production, Campbell's Soup Company is?

A. No, I don't.

Q. Do you know whether they are as large or larger than some of the companies referred to as the leading manufacturers in your table?

A. Yes, I have heard.

Q. What have you heard?

A. Well, I have heard that they are probably larger than National Can Company.

Q. So you know or at least you have information that these are not the three leading manufacturers, as you have used the term?

A. These are the three leading companies, to my knowledge, that have cans for sale.

Q. And that we are supposed to learn from the face of this table; is that correct?

[fol. 2903] A. No. I think perhaps other—there may be other documents in the record.

Q. You had set some percentages up here.

A. Yes, sir.

Q. To show that these companies have the percentages of the leading companies of the industry. Now you say that perhaps other companies would go in there; is that right?

A. I didn't say that; no, sir.

Q. Well, what did you say about Campbell Soup?

A. I said perhaps they are larger than National Can.

Q. How about Sherwin Williams Paint Company, are they larger than National Can?

A. From all I have heard, I don't think they are.

Q. How about Carnation Milk, are they larger than National Can?

A. Same would be true there, from all I have read.

Q. Have you ever seen any figures of Campbell's Soup, Sherwin Williams, Carnation Milk or Pet or Borden's?

A. I haven't seen any volume of production of canned figures. I have seen dollar volume figures.

[fol. 2904] Q. Dollar volume of their entire business; is that right, sir?

A. That's right, sir.

Q. But you wouldn't be able to say now whether they are larger or not as large as National Can; is that right?

A. Which ones do you speak of?

Q. Any of those I have named, are they as large as——

A. I think I said that Campbell's Soup was larger than National Can.

Q. How about Crown Cork and Seal? Have you ever seen their figures?

A. I haven't seen their recent production or shipment figures on volume of cans, no, sir.

Q. You wouldn't have any idea where they would rank in size; is that true?

A. Except in general knowledge and what I have read, that they're fourth largest.

Q. Fourth largest what?

A. Can company.

Q. We are now getting confused. A moment ago I thought you said that Campbell's Soup might be the third largest. But then you put Crown after Campbell's Soup. [fol. 2905] A. Perhaps I should qualify my statement by saying fourth largest can company that has cans for sale.

Q. How about Sherwin Williams, do they sell cans?

A. I think to some extent they do.

Q. What do you mean by "some extent"?

A. Well, they used some production, I understand, for paint, their own production for paint.

Q. Then they sell outside, also?

A. Yes, they do.

Q. Do the figures on this table include exports?

A. There are no figures given in the Bureau of Census statistics for export cans, that I know of.

Q. So you are saying they are not separated out?

A. They are not separated out, yes, sir.

Q. So if there are any exports, this table includes them; is that correct?

A. That would be a fair statement.

The Court: But you did deduct the Hawaiian Islands shipment?

The Witness: Yes, sir.

The Court: Why is that?

The Witness: We tried to confine this table strictly to [fol. 2906] continental United States. Those cans that are made out there are used out there. With respect to were there any cans, I think, that are made in the United

States and shipped elsewhere, for instance to Puerto Rico, I have—we have no knowledge of that.

Q. Well, did you deduct cans that were shipped from the United States to Hawaiian Islands?

A. No, we did not.

By the Court:

Q. Tell me about this Hawaiian Island deduction. I don't quite understand that. What did you deduct with respect to Hawaii?

A. These deductions made from Hawaiian Islands were—excuse me, your Honor, what book are we looking at?

Mr. Johnson: Looking at 2AB.

Q. 2AB, as I understand it. I see a footnote here: "Source Bureau of Census," and so forth, "less Hawaiian Island shipments."

A. Oh, yes, sir. Those shipments from Hawaiian Island are for the American can companies that are located in Hawaiian Islands. We deducted those from the total United States figures to get a continental United States total.

[fol. 2907] Q. In other words, those were the cans manufactured by American Can in Hawaiian Islands?

A. That's right, sir.

By Mr. Johnson:

Q. Now, during this period cans were manufactured in Hawaii by at least one company for its own use, were they not?

A. What year do you speak of, sir?

Q. 1957, at least.

A. I think that's right.

Q. And probably '56?

A. Perhaps in '56, too.

Q. Did you deduct those?

A. I can't recall whether we did or not. I would have to refer to my work papers. I don't recall.

Q. You know you deducted the American cans.

A. Yes, I know we did that.

Q. You can't recall whether you deducted the local self-manufacturer?

A. I can't recall we did. I assume we didn't though, because we didn't—

Q. You did not?

A. Did not.

[fol. 2908] Q. You know you didn't, don't you?

A. Well, I would say—I would like to look at my work papers first—I feel sure that we didn't. I say that because I don't think we had any volume for any self-manufacturer in Hawaii.

Q. Did you try to get them?

A. I don't recall.

Q. Continental Can does not have plants in Hawaii, does it?

A. No, it does not.

Q. So the effect of deducting Hawaiian production, for whatever reason you deducted it, would increase Continental's share of the balance, would it not?

A. If we eliminated Hawaiian Islands?

Q. Yes.

A. Yes, sir.

Q. Is that why you deducted Hawaii?

A. Oh, I would say the reason why we deducted Hawaii, we made these tables, Continental United States, to show principally in the areas in which Continental does business.

Q. Why didn't you deduct the State of Maine?

A. We don't have any statistics on that.

Q. How did you get the Hawaiian Islands statistics?

[fol. 2909] A. From American Can Company.

Q. Couldn't you get the State of Maine figures from the same place, from the companies involved?

A. Well, I didn't know all the companies that were manufacturing cans in the State of Maine.

Q. What I am trying to get at is your rationale in deducting the Hawaiian Islands. You say that you wanted to limit it to the continental United States?

A. That's right.

Q. Why did you want to limit it to the continental United States?

A. To the area that Continental Can sells cans.

Q. Do you know whether Continental Can sells cans to Hawaii or not?

A. It is my understanding they did not.

Q. Do you have any reason to believe that it doesn't?

A. Well, the only reason I have to believe that they don't is the cost of shipment of cans from continental United States out to the Hawaiian Islands would practically forbid it.

Q. Forbidden by whom?

A. Not forbidden. The costs would be excessive to ship [fol. 2910] cans out there.

Q. That is a determination you made; is that right? You really don't know anything about it, do you?

A. No, I said I was not a technician at this. I am trying to give you the best answers I can.

Q. You have given me now the best explanation you can give for deducting Hawaiian Island figures; is that right?

A. I gave you, yes, sir.

Q. Mr. Finn, would you look at the note on table 3AB, referring to source, sources given, United States total, from the Bureau of Census?

A. 3A?

Q. I am sorry. 2AB, the same table we have been looking at.

A. Yes.

Q. The source says, "United States total from the Bureau of Census, facts for industry." The totals given, I understand it, are those in the first line of the table for 1957, 41 million figure?

A. Yes, sir.

[fol. 2911] Q. Now, that is not literally true, is it, that you found that figure in the Bureau of the Census Facts for Industry?

A. No, that is not.

Q. Now, these tables, all together, contain a great number of figures, thousands of units of metal containers, do they not?

A. They are all in units.

Q. All through the tables there is a great number of them?

A. Yes.

Q. Will you agree with me that every one of those tables,

without exception, is an estimate made by someone other than the United States Department of Commerce; every one of the unit figures—

A. Every one—

Q. —referred to in these tables is an estimate?

A. I think that is perhaps right.

Q. And they are not estimates made by the United States Department of Commerce?

A. You were walking away, I didn't hear you.

Q. They were not made by the Bureau of Census or any part of the United States Department of Commerce?

A. The unit figures, no, sir.

[fol. 2912] Q. Will you tell me where those unit figures come from? You can concentrate, if you like, on the total volume figure for 1957.

A. You are speaking about the 41 million?

Q. 41,529,266,000.

A. Your question was how—

Q. Where did that figure come from?

A. Well, that figure is from the Can Manufacturers Institute.

Q. Is it from the Can Manufacturers Institute, or did you create it?

A. No. That is from Can Manufacturers Institute.

Q. Maybe I have misread your note, and I didn't read that as being a reference to Can Manufacturers Institute. There is an explanation there of how it is done. Do you say that you just copied that note from some Can Manufacturers Institute material, or did you do something else?

A. These total figures—I would like to refer, your Honor, to a document that I have here, if I may.

The Court: Yes.

A. I can't recall.

The Court: I see no reason why the witness cannot re-[fol. 2913] fresh his collection from a document.

Mr. Johnson: No, I don't either.

The Court: Assuming that these documents were used by you or referred to by you in the course of the preparation of the tables.

I think if you can find the rest of that source material, you might save yourself some time.

A. Yes. That figure is derived by us, because we had to subtract the Hawaiian Island shipments.

Q. How did you get that figure?

A. By conversions. We converted the short tons of steel in Hawaiian Islands—well, we used an overall conversion figure for the continental United States in arriving at that figure.

Q. Well, I am not sure if we can understand what you mean when you talk about a conversion figure. Do you know how the production of metal container companies is reported to the Bureau of the Census?

A. Yes.

Q. In what units?

A. Yes. Generally they are on the base boxes of steel.

Q. Do you know what a base box of steel is?

A. Well, it is a base box of tin plate. It has various [fol. 2914] weights.

Q. It has various weights, you say?

A. It has various weights.

Q. Do you know the range of weights of a base box?

A. No, I am not familiar with all this.

Q. Do you know how many sheets of tin plate are in a base box of tin plate?

A. No, sir.

Q. All right. You say that the companies report in base boxes, and your figures here are clearly not in base boxes, are they?

A. No, they are not.

Q. All right. What happened to those base-box figures?

A. They are converted into tons.

Q. On what basis are they converted into tons?

A. Well, there are various converting figures used, depending on the categories in which the tin is used.

Q. Well, at this point, Mr. Finn, maybe you would tell us what categories the companies report to the Bureau of the Census in? Will you do that?

A. Yes.

[fol. 2915] The Court: You remember we got a Census report that would give that, the various categories. What about that form you produced the other day; do you remember?

Mr. Austern: Off the record, I left it on your desk, sir.

A. The categories are fruits and vegetables (including juice), evaporated and condensed milk, other dairy products, meat, including poultry, fish and seafood, coffee, lard and shortening, soft drinks—

The Court: Let me ask you this, Mr. Witness: I show you a green form. Does that contain the categories the Census Bureau uses, that you are just referring to?

The Witness: Yes, sir, it does.

The Court: All right. Let's have that marked in evidence at this point so we know what we are talking about. This is courtesy of Mr. Austern.

(Defendants' Exhibit V received in evidence.)

By Mr. Johnson:

Q. All right. With that, then, Mr. Finn, may we go back to our problem of converting these base boxes into something else.

The Court: Just so we understand one another here, [fol. 2916] Mr. Finn, I take it there are 13 different categories in the Census reports; is that right?

The Witness: I believe that is right, sir.

The Court: All right. Those are the 13 categories shown on Defendants' Exhibit V.

By the Court.

Q. Now, will you try to take this conversion factor and explain precisely what you did?

A. Well, your Honor, it wasn't necessary for me to convert the base boxes of steel into tons of steel. The Can Manufacturers Institute does that for you in their publication. So I used the tons of steel as outlined in their book, which is identical to the conversions used by the Bureau of the Census, that is to say, even though the Bureau of the Census statistics are reported on the base boxes of steel—base boxes of steel, they also give you a conversion factor there so you can convert it into tons. This was done for us by the Can Manufacturers Institute.

Q. Well, I will tell you: what I would like to know is precisely what the method or the process is by which you come out with—I presume that on 2A and B, the figure

[fol. 2917] of all types of metal containers, 41 billion-odd, under 1957, that means individual units of containers, is that right?

A. That's right, sir.

Q. Now, what I want to know, not being a mathematician or a statistician, but being a simple-minded fellow, what happens when you get this base boxes of steel consumed in the manufacture of cans out of, let's say, the Census reports, and you want to arrive at how many cans that is? What do you do?

A. Well, as I mentioned before, the Can Manufacturers Institute puts out this publication in which they give you all of the tons of steel used in making cans in each of these categories. They not only give you that but they give you—

Q. Wait a minute. You have got to go a little more slowly, because I am not following you.

A. Yes, sir.

Q. Just what is this publication of the—you see, I have never heard of this before except looking at a table. Mr. Johnson studied it, counsel for both sides studied it, and you are familiar with it. But I have come to this with a blank mind, and all I know is that I see certain figures. I [fol. 2918] know there are certain figures regarding base boxes; or whatever the name is—base boxes of steel—and I suddenly find here 41 million metal cans.

Now, you hold my hand and take me gently through this and show me what happens. Will you do that?

A. Yes, sir.

Q. All right. You start off with base boxes.

A. You start out with base boxes of steel—

Q. Now tell me, first off, so we get this plain, what are base boxes of steel?

A. They are sheet steel shipped to the can companies by the steel companies in boxes.

Q. I see. Bit sheets of steel in boxes?

A. That's right.

Mr. Johnson: In varying—

Q. How many sheets are there in a box?

The Court: Does anybody know?

A. It depends on the weight.

Mr. Johnson: The number of sheets depends on the weight?

The Witness: No, I think the number of sheets are the same. I just don't know what—how many there are the present time.

[fol. 2919] By the Court:

Q. You see, I am a funny fellow. I like to picture something.

Now, how big are these things?

A. I don't know.

Q. Would they be as big as the counsel table or would they be as big as this book?

A. I think a description, if I may—as I say, I am not a technical man, but I think they are a couple of feet square at least.

Q. A couple of feet square at least?

A. Yes, sir.

By Mr. Johnson:

Q. But you have never seen one; is that true?

A. No. I have seen pictures of them. I have never actually seen them.

By the Court:

Q. Let me ask you this: How much would a base box of steel for the purpose of making cans weigh? A base box of these sheets.

A. Well, they weigh from 88 pounds up.

Q. Up to how many?

A. I don't know, your Honor. I would say about 250 pounds. I am not too sure.

[fol. 2920] By Mr. Johnson:

Q. Do they range downward, below 88 pounds, also?

A. Oh, I think they do make some below 88 pounds, but generally—

Q. So you have a considerable range of weight?

A. Yes. Yes. Well, if I may go on, these base boxes—

By the Court:

Q. Now, I have already got another question.

Here is a report of base boxes of steel. Now, if the base boxes of steel vary in weight from 88 to 200 pounds, how do you arrive at any normal base on which to build?

A. Well, we—

The Court: If counsel think these questions are silly, why, just tell me.

Mr. Johnson: No, sir, they are not.

Mr. McManus: Perhaps, your Honor, I could help, if I may. I don't want to testify, but I have a copy of Facts for Industry here which indicates on the front—and this was the source data—that they collect this data on base boxes of steel and they convert it to short tons even on their own report, and on the front it says, "Base boxes for short ton of steel," and then it says "Fruits and vegetables," [fol. 2921] and the sum is 21.4. If we are sort of talking in the dark, if you would like to take a look at this—

The Court: Oh, I am talking in the dark.

Mr. McManus: You may want to take a look at this.

The Court: I have never seen this material.

Mr. McManus: Yes, your Honor.

By the Court:

Q. In other words, see if I have got this now, Mr. Finn, there are different weights of base boxes of steel that are used for different kinds of cans; is that right?

A. That's right, to make cans.

Q. So that if you took your fruit and vegetable category, you would get 21.4 base boxes of steel per short ton of steel, whereas if you took pet food, you would get 24, let's say. I am reading from this pamphlet.

A. That's right.

Q. All right. Well, now, tell me what you do then? You first take the base boxes of steel, and, if you have a fruit and vegetable category, you take the number of base boxes and you divide it by 21.4; is that right?

[fol. 2922] A. That's correct, sir.

Q. And then you get the number of short tons of steel?

A. That's right.

Q. Now, having the short tons of steel, how do you get the next step, which I hope is the next step, which is how do you translate that into units?

Mr. Johnson: Before we go on to that, may I ask a couple of questions at this point?

By Mr. Johnson:

Q. Do you know where the Census gets their conversion factor?

The Court: No, no, Mr. Johnson. Let me finish this, and we will go back to that. I just want to get the complete process in my mind, and then you can go back.

Mr. Johnson: All right, sir.

By the Court:

Q. All right. We have got the short tons of steel. Now, how do you take the short tons of steel and translate it into actual items, can items?

A. Well, as I mentioned, the Can Manufacturers Institute gives you an estimate of the actual number of cans [fol. 2923] which might have been produced from each of these categories. So—

Q. In other words, if you took a short ton of steel, it would, according to these figures that you have got from the Can Manufacturers Institute, produce so many fruit and vegetable cans, it would produce so many evaporated and condensed milk cans, etc., etc.; is that right?

A. Yes, sir. That is their estimate. I mean, they are able to estimate how many cans were used from that tonnage.

Q. In other words, what do they say, for instance, with respect to fruits and vegetables? How many cans, that is, units, individual cans, would a ton of steel make for fruits and vegetables?

A. Well, we figured 93—9,399 cans. 9,349 cans.

Q. That is what they say. Is that what the Can Manufacturers Institute says?

A. That is our figure, your Honor, by taking the tonnage in that category and dividing it into the estimated number of cans they say was produced, so we come out with an average.

Q. Oh, I see. In other words, the Can Manufacturers [fol. 2924] Institute doesn't come up with a figure in which he says one ton of steel will manufacture 9,000 cans plus. What you do is take the number of tons in the category and divide it into the total number of units in the category; is that right.

A. That's right.

Q. Yes.

A. And I come out with an overall average of cans in that particular category.

Q. And you do the same thing for evaporated and condensed milk, coffee, beer, the various categories; is that right?

A. Well, since we merely have a food category, we take the total food. In other words, it would include for fruit and vegetables, evaporated and condensed milk, other dairy products, meat, fish and seafood, lard and shortening, and we found out that a total of so much tonnage was used to make those cans. Then we go to—

Q. Wait a minute. The tonnage you got from converting the Census base box figures into tons of steel; is that right?

A. That's right.

[fol. 2925] Q. That is where you got the tons.

Now, where did you get the individual can units?

A. The estimate—the individual can units are from the Can Manufacturers Institute.

Q. I see. The individual can units are from the Can Manufacturers Institute?

A. That's right, sir.

Q. Well, let me ask you—one minute, now. Just let us take 2 C, "Metal food containers." According to this figure, according to this table, taking the year 1957, there are 25,379,000,000-odd metal food containers?

A. Yes, sir.

Q. Can you find that figure anywhere in the Can Manufacturers Institute reports?

A. Not that precise figure.

Q. What figure do you find there for that category for the year 1957?

Mr. Johnson: Well, there isn't any such category, is there?

The Witness: Total food?

Mr. Johnson: Yes.

The Witness: There is a category for total food, and in [fol. 2926] that, your Honor, we included coffee. There is a total actual number of cans made for food that is furnished by can manufacturers.

Mr. Johnson: You say a total number actual?

The Witness: It is called the actual numbers of cans which might have been produced from the amount of steel consumed.

By the Court:

Q. Well, now, what is the figure—I take it that you do that because the category food in the Can Manufacturers Institute does not include coffee; is that right?

A. That's right, sir.

[fol. 2927] Q. Whereas the Census people do include it as coffee, do they, or they don't—I see, you just included it as coffee under food?

A. We put coffee under food.

Q. All right. Now what is the figure that the Can Manufacturers Institute has for total volume of food containers produced in the United States for the year 1957?

A. They have for total food, they have 24,936,310,000, and to that we added coffee, which was 904,438,000. We come up with a figure of 25,840,748,000.

Q. Now that would be the Can Manufacturers' estimate of the number of individual food containers, metal food containers, so-called, produced in the United States in 1957.

A. That's right.

Q. Now—

A. If I may say something, your Honor?

Q. Yes, sure.

A. Now, we know the tonnage that was made, that was consumed in making those cans.

Q. Yes.

A. So we merely divide the tonnage into that estimate of those 25 billion cans and we come out with a figure of [fol. 2928] so many cans per ton.

Q. Yes. But this is the tonnage, the tonnage is taken

from the Census reports, isn't it, or is a translation from the base box figures in the Census reports, in tonnage?

A. Well, your Honor, I have really two sources. It is really the Census or the Can Manufacturers Institute, and they use the same figures.

Q. That is what I am getting at. What I want to know is, is this the Can Manufacturers Institute figure in here, or is it the Census figure? Because it doesn't seem to me—I may be wrong on this—that the Census figure can be translated into actual units of cans without referring directly to the Can Manufacturers Institute figure, which estimates the actual number of cans produced anyway. Am I right on that?

A. Your Honor, the tonnage that you can convert from the Census base boxes of steel by those conversion figures into tons are identical with the tonnage figures that are given in the Can Manufacturers Institute report. But they go a step further. They take that tonnage and convert it into actual number of cans which might have been produced from that tonnage.

Q. Well, look, now let me follow. If the Can Manufacturers Institute took the Census tonnage or the Census tonnage converted from base boxes—

A. Yes.

Q. —and translated it into so many units that might have been produced, why is their figure different from yours? It would seem to me, Mr. Finn, that by a simple mathematical computation the figures would have to come out the same. I don't understand the difference. I grant you, the difference isn't all that enormous. I am just trying to understand this.

A. Well, we have excluded the Hawaiian Islands from our figures. They haven't—

Q. Oh. So if you took the Hawaiian Islands tonnage that you have excluded and added it to the 25,379,074,000, then you would come out with the same figure that the Can Manufacturers Institute comes out; is that right?

A. That's right.

Q. All right. So that what we are really doing here is taking the Can Manufacturers Institute estimate of what the total units produced in the United States were for 1957; isn't that right?

A. That's right.

[fol. 2930] The Court: We will take a recess at this point.

(Recess)

The Court: All right, Mr. Johnson.

Cross-examination Continued.

By Mr. Johnson:

Q. Shall we go back over some of this, Mr. Finn? Going back to the first conversion, the conversion from base boxes to short tons, I think in referring there to fruit and vegetables, you said a factor of 21.4 had been used, as shown by this Facts for Industry sheet; is that correct?

A. Yes, sir.

Q. Do you know where that figure of 21.4 came from?

A. Bureau of Census.

Q. Do you know what assumptions it is based on?

A. No, sir.

Q. It is based on some assumptions, is it not?

A. I am not—

Q. Well, you don't understand it to reflect an actual number of tons, do you?

A. No, I wouldn't think it would.

Q. And when the conversion is made from base boxes, which you have said varied in weight, to short tons, a [fol. 2931] figure is reached which is an assumed figure, is it not?

Mr. McManus: I object, your Honor. We are offering it as a Bureau of Census figure, not an assumed figure. That is what is in the Bureau of Census.

The Court: Well, Mr. Johnson is trying to find out, as I understand it, on what basis the Bureau of Census arrived at this conclusion. Now, if nobody knows—

Mr. McManus: And the witness says he doesn't know how they did it.

Mr. Johnson: He says he didn't know, and I am pressing him as to whether or not he doesn't understand it is an assumed figure?

A. I presume it is an assumed figure.

Q. Could it be anything else than an assumed figure?

A. Well, it is an assumed figure that has been used for many years.

By the Court:

Q. Don't you suppose, Mr. Witness, that at some time somebody sat down with a pencil and paper, or went to a plant, or did something to arrive at a probable figure? [fol. 2932] Anyway, they didn't pull this out of the air, do you suppose?

A. No, sir; they did not. I think this figure was arrived at back in the second World War, before the War Production Board. Now I am not too sure of this. Historically speaking, I think it was either the Can Manufacturers Association or the can companies in conjunction with the government figured out that maybe this was a figure to arrive at, to get the amount of steel needed during the war by these companies when they were allocating steel.

Q. When the problem of steel allocation was of some considerable importance.

A. That's right. And it has been used in existence for some number of years. I haven't checked it to see whether or not they are identical, but I think they are.

The Court: All right.

By Mr. Johnson:

Q. And it has been used for quite a few years?

A. Yes, sir.

Q. As far as you know, has it been adjusted to give effect to changes in common sizes or weights of containers?

[fol. 2933] A. As I mentioned, I haven't checked that at all, going back a number of years.

Q. All right, sir. Now getting a tonnage of steel used on this assumed basis, do you know how Can Manufacturers Institute gets its estimate of number of cans which might have been produced from that estimated number of tons of steel consumed?

A. No, I don't know how they arrived at that.

Q. Somehow they get an estimate.

A. Yes, sir.

Q. But you don't know what it is based on; is that correct?

A. No, sir.

Q. You don't know whether it assumes certain sizes or whether it assumes certain amount of weight?

A. No, sir. I have never delved into that with them at all.

Q. Now looking again at 2AB, the table we have been working on—

A. 2AB?

Q. Well, sir, I believe we probably do better by going to table 2C, the next following one. There you will see in the first column for 1957 a figure for Continental Can. Will you tell me how you got that figure?

[fol. 2934] A. We multiply the tonnage for Continental Can by the conversion factor that I previously mentioned we arrived at through the Can Manufacturers Institute.

The Court: Are those Continental Can figures out of their Census report?

Mr. Johnsn: Continental Can, like other companies, reports its base boxes.

The Court: In other words, it is a base box—let me ask you this: As far as the Continental figures are concerned, you take the base box figure shown on their Census reports, do you?

The Witness: Yes, sir.

The Court: And then you convert it to short tons, and then you apply the Cannners Institute conversion factor.

The Witness: That's right, sir.

By Mr. Johnson:

Q. Well, is that quite right? I want to focus on that last conversion factor and how you got that. Did you not take the sum of all of Can Manufacturers Institute's converted figures and add coffee, and then create a conversion factor from that?

A. Yes, that's right.

[fol. 2935] Q. So that you aggregated them and created a conversion factor from that?

A. Yes.

Q. And you aggregated them without regard to the company's product mix?

A. That's right.

The Court: Without regard to what, Mr. Johnson?

Mr. Johnson: The company's product mix.

Q. Let me try again to clarify it.

The Court: Yes, I understand. It is clear to me.

Q. Do you know if Can Manufacturers Institute ever followed that procedure?

A. No, I do not.

Q. Do you know that they didn't ever follow that procedure?

A. No, I do not.

Q. Do you think that procedure is statistically sound?

A. It is the best available.

Q. Is that the answer to my question?

A. It is the best available. That is all I could find.

[fol. 2936] Q. You agree with me you are taking things of different weights and creating an average out of them, aren't you?

A. I am taking the reported statistics from the Bureau of Census and reported statistics from Can Manufacturers Institute, and as I mentioned, I get a conversion factor, and I have applied it to the various reports made by each of these companies.

By the Court:

Q. Well now, just let me take an example. Let's suppose—I am not saying this is a fact—but let's suppose for purposes of this discussion Continental Can made in their food products nothing but baby food. If I remember the baby food tin, the baby food tin is a small tin, as compared with, let's say, the tomato, the canned tomato, or the canned peas. Would you say that if Continental Can Company produced nothing but baby food tins, this conversion factor of the Institute would be appropriate to determine the number of units that Continental Can produces?

A. No, I wouldn't, your Honor, because you got, you got to really apply a little reasonableness to your statistics. These companies, first two companies, we know make

all kinds of cans. If they just made baby food, I don't [fol. 2937] think I'd use this.

Q. All right. Then what you are saying, I take it, Mr. Finn, is that in view of the fact that as you consider that Continental Can Company made a general line of food containers, you thought that the conversion factor—a line which was generally representative of the industry, you thought that that conversion factor would be appropriate; is that right?

A. I do, sir; that's right.

By Mr. Johnson.

Q. And in doing that, Mr. Finn, you added in to this aggregate a figure relating to, for example, other dairy products, which is 148 billion units, estimated by CMI?

A. Dairy products are in the food category, yes, sir.

Q. So that becomes a factor in your conversion rate?

A. Yes, sir.

Q. Then you used a conversion rate so built up to compare American Can and Continental Can and National Can; is that correct?

A. That is correct.

Q. Regardless of whether those companies might have [fol. 2938] made containers for other dairy products, or evaporated condensed milk or not?

A. That is very true.

Mr. McManus: Your Honor, we have been referring to the CMI book so much, do you think we could make an offer of that document for the purpose of underlying data? Mr. Hughes refers to it and the witness.

The Court: I certainly wouldn't mind looking at the thing. I think it ought to be marked for identification at least at this stage. I would like to see one of them.

Mr. McManus: All right, sir.

Would you please mark this with whatever the next Government's Exhibit number is.

(Marked Government's Exhibit 1202 for identification.)

Mr. Johnson: Are you offering it?

Mr. McManus: Yes, I am.

The Court: I will reserve on this offer, just as I am reserving on this whole line of testimony.

Mr. McManus: Yes, sir.

The Court: As this is being marked for identification, have you got a copy for me?

[fol. 2939] Mr. McManus: Yes, sir.

The Court: Thank you.

All right, you go ahead, Mr. Johnson.

By Mr. Johnson:

Q. You will agree with me, will you not, that this conversion that you have made is one which you have never seen anyone else use?

A. Yes, sir.

Q. Something that you created for your own purpose, isn't it?

A. I haven't seen it anywhere else used.

Q. Why did you add coffee to the food list as set up by CMI?

A. Well, we had staff discussions on that particular question. We determined or felt that for the purpose of making these comparisons, that coffee should be in food. It was—some people take coffee as a food and some people say it's a beverage. So for the purpose of these statistics we merely put it in the food line.

Q. Did you include pet foods?

A. Pet foods?

Q. Yes.

A. No, sir.

[fol. 2940] Q. Why didn't you include those?

A. Well, I think I mentioned earlier that food, the food category we used was food for human consumption.

Q. I want to go on now to table 3A, and before I get into that, Mr. Finn, can you tell me how the glass container companies report their figures to the Department of Commerce, Bureau of Census?

A. You are speaking about categories?

Q. Yes, can you list the categories in which they report?

A. Yes. They have food, beverage—

Q. Well, they don't start that way, do they? Don't they have a broader category?

A. You want the—the categories are first given all types, a total. Then you have direct exports, and then you have domestic. Then you have domestic by type, and they start with narrow neck first, and they give you food; medicinal and health; household and industrial; toiletries and cosmetics; beverage returnable; beverages non-returnable; beer returnable; beer non-returnable; liquor; wine; and then they start with wide mouth total, and under that they have food, which includes fruit jars and jelly glasses; medicinal and health; household and industrial; toiletries and [fol. 2941] cosmetics; dairy products; and packer's tumblers.

Q. Now, those categories are very different from those that we saw used for metal containers, are they not?

A. Very decidedly, sir, yes, sir.

Q. Now looking at table 3A, as I understand it, this purports to be a combination of glass container shipments and of metal container shipments, to show the total glass and metal container shipments; is that correct?

A. That is correct, sir.

Q. And those unit figures have been built up, as you have described it here this afternoon.

A. That is correct, sir.

Q. Did you ever see any other attempt made to compare glass and metal container shipments in the United States?

A. I never have.

Q. The Bureau of Census doesn't do it, does it?

A. No, sir.

Q. And as far as you know, no trade association does it?

A. That is correct.

[fol. 2942] Q. Something as that, that as far as you can tell that no one ever saw the point in doing before?

A. I have never found any statistics on that at all.

Q. Look at table 3D, will you, sir? There you have made an attempt to compare shipments of glass and metal beer containers for the several years, and after Continental Can Company in the year 1957 you have a percentage of 38.6; do you find that figure?

A. Yes, sir.

Q. Would you conclude from that figure that 38.6 per cent of all beer that was sold in containers in 1957 was sold in containers manufactured by Continental Can?

A. In glass and metal containers, sir?

Q. Would you conclude that?

A. This—I wouldn't conclude it was all beer sold, no, sir.

[fol. 2943] Q. What does that figure stand for?

A. This beer—this figure shows that all the glass and metal containers sold to—

The Court: You are excluding beer in cans and draught beer, are you not?

Mr. Johnson: Yes, sir.

The Court: Well, that is what you were about to say?

The Witness: That, your Honor, and, in addition to that, as Mr. Johnson framed his question, beer is sold in bottles that were sold in years previous to this particular year. In other words, returnable bottles are used many times over, so therefore beer sold in this particular year—

The Court: All right. I think you have got a point there, and I think you better reframe your question.

By Mr. Johnson:

Q. Did you conclude from that figure that 36.6 per cent of all beer sold in containers in 1956 was sold in containers manufactured by Continental Can Company?

A. No, sir. This 38.6 per cent shows the containers sold [fol. 2944] in this particular year for beer purposes.

The Court: It has nothing to do with the returnable beer bottle which is used a number of times?

The Witness: That's right.

The Court: So that as far as the returnable beer bottle is concerned, Continental Can might, for all one knows, have sold 20 million of those and they were all in use 20 times, so you would yet 400 million of those that wouldn't figure in this at all.

The Witness: That's right, sir.

The Court: Or 380 million, anyway.

The Witness: Yes, sir.

By Mr. Johnson:

Q. Had it occurred to you, Mr. Finn, that that might be the reason why the Bureau of the Census has all these years carefully separated into returnable and non-returnable bottles?

A. Well, they perhaps were separated for somebody else's use. These statistics are used by a lot of people.

Q. The Bureau of the Census has never added them, has it?

A. Never added them, no, sir.

Q. You set about to add them?

[fol. 2945] A. I consolidated them, yes.

Q. And then you get a percentage out of that consolidation?

A. Yes.

Q. Now, will you agree with me, Mr. Finn, that with respect to all of these section 3 tables I could get different totals and different percentages by using different conversion factors?

A. Oh, yes, sir.

Q. That I could get different totals and different percentages if I used different leading companies?

A. I don't understand that question.

Q. Well, you have separated out here six companies which you call the leading six companies. If I used other companies and called them the leading companies, like Campbell's soup, for example, I would get different totals and I would get different percentages, wouldn't I?

A. I think you would.

Q. And I would get very different totals and different percentages if I made different assumptions with respect to the average size of containers also, wouldn't I?

A. Yes, if you had those statistics, yes.

[fol. 2946] Q. Going back to this beer figure on table 3 D, if you had used an assumption of the number of times returnable beer bottles were used and included that, the figure attributable to Continental would be far lower than it is, would it not?

Mr. McManus: I object to that, your Honor. Is he stating a fact there?

The Court: Well, he is asking whether or not that is a fact.

Mr. McManus: All right.

A. I can best answer that question by saying that we don't—nowhere in these statistics do we take into consideration the re-use of a container after it has once been filled. Beer bottles returnable would fall in that category. These bottles are sold or shipped or shipments made during this particular year.

The Court: Gentlemen, since we have marked for identification this annual report of steel and tin consumed in metal cans, I think we ought to have one, at least, of the Facts for Industry marked for identification. We have referred to it a number of times.

Mark it as a government's exhibit.

(Marked Government's Exhibit 1203 for identification. [fol. 2947].)

By Mr. Johnson:

Q. Well, sir, what does that figure of 38.6 per cent mean to you?

A. Well, it means that the containers, both glass and metal shipments for that particular year that were sold for beer purposes—that is how many Continental—the percentage of Continental's share of that particular market.

Q. Turning now to folder B, would you tell me, first, what you attempted to do in preparing those tables?

A. The folder B is very similar to folder A, and, in addition, it has a breakdown between the East and West markets; at least, the glass and metal containers sold east of the Rockies and metal containers sold west of the Rockies.

Q. Now, I understand you eliminated Hawaiian can shipments from these tables; is that correct?

A. That's correct.

Q. Did you eliminate Hawaiian glass shipments?

A. Are you speaking about shipments made from the continental United States to the Hawaiian Islands?

Q. Or manufactured in Hawaii, if any were manufactured there?

A. If the glass were shipped to the Hawaiian Islands, we assumed that it was not exported.

Q. That it was not exported?

A. Yes, that's right.

Q. Not exported from where?

A. Well, it wasn't included in the total. It wasn't included in the total of exports of glass shipments, as referred to in the sentence.

Q. Let me see if I understand you. There are breweries in Hawaii that use glass containers, are there not?

A. Yes.

Q. And they get those glass containers from somewhere, which may be the United States?

A. Yes, sir.

Q. Now, as I understand what you have done, you have excluded cans which might have been used in the Hawaiian Islands but have not excluded glass containers used in the Hawaiian Islands; is that right?

A. We excluded cans made in Hawaii.

Q. You attached some magic to the fact that they were made there?

A. If a can was made in the United States and shipped [fol. 2949] to the Hawaiian Islands, they would be included in my figures.

The Court: Let me ask you this: That would depend on which set of figures they were in; that is, whether they were east or west of the Rockies would depend on the plant that made the shipment; is that right?

The Witness: That's right.

The Court: But if they were shipped from, let's say, St. Louis to the Hawaiian Islands, it would be included in the east figure. If they were made in San Francisco, let's say, and shipped to the Hawaiian Islands, they would be in the west figures?

The Witness: That's correct, sir.

By Mr. Johnson:

Q. Well, I am still somewhat mystified at what you have done here. You are trying to compare cans and glass, trying to compare can and glass shipments, and, as I understand it, you have for some reason that I have not yet got, eliminated cans that were manufactured in the Hawaiian

Islands but not eliminated glass containers that were used in the Hawaiian Islands, is that right?

A. It is a distinction. The cans were manufactured in [fol. 2950] Hawaii. The glass were not.

Q. Is that the reason you eliminated the cans and did not eliminate the glass?

A. The cans—we included in our glass shipments all, irrespective of where they went, exclusive of those in the category of exports. Now, they could have gone—some could have gone to the Hawaiian Islands. That glass is made on the West Coast.

Q. And, in fact, you know that some of it did go there?

A. Probably did. Probably.

Q. I am having some trouble with this. What I still don't understand is why you would eliminate those cans which were made in Hawaii and did not eliminate those glass containers which were made by manufacturers in Hawaii. You did not eliminate those cans which were shipped into Hawaii and did not eliminate glass containers which were shipped into Hawaii. I understand that you say you eliminated cans because they were made in Hawaii. Why did you?

A. Well, I think the cans made in Hawaii were not shipped over to the continental United States in an empty fashion. They were shipped in here filled, and Continental [fol. 2951] had had no plants in the Hawaiian Islands. We eliminated the Hawaiian simply to cover the territory that is served by Continental Can.

Q. Going back to my earlier question, you know, do you not, that Continental Can has no can plant in the State of Maine, don't you?

A. Oh, I didn't know unless I referred to some list.

Q. But that didn't occur to you, to take that into consideration?

A. To eliminate.—

Q. To eliminate the State of Maine?

A. No, I had no knowledge that Continental does not sell in Maine.

Q. I must say I am still in the dark as to why you eliminated the manufactures by American Can in Hawaii. Let me try something else.

The Court: Now, the question is, it is now 4:30, Mr. Johnson. How much longer have you with this witness?

Mr. Johnson: I have quite a bit more.

The Court: In other words, if I took another 15 minutes tonight it would not help us too much?

[fol. 2952] Mr. Johnson: No, it wouldn't, I am afraid, sir.

The Court: Now, gentlemen, I think this is fairly slow stuff, and I think it would be well if we took a recess now.

When you say "much more," Mr. Johnson, on the basis of your experience today, how much longer will you take? You not only have this witness but you have the chart man, too.

Mr. Johnson: Well, I suppose it would take the forenoon with this witness, and, if we can speed it up with the next one, I don't know—

The Court: All right. Gentlemen, we will take a recess until 10:30 tomorrow morning.

(Adjourned to October 11, 1960, at 10:30 a.m.)

[fol. 2953] New York, October 11, 1960, 10:30 a.m.

Trial resumed

The Court: This morning, the same rules will apply as applied yesterday in connection with the closing of the courtroom except for those whom I named yesterday, but I want to be sure that Mr. Austern arrives, gets in if he arrives.

Mr. Hughes: I was going to say that our three delegates haven't arrived either.

The Court: All right. Well, if you will keep an eye on the situation, Mr. Clerk, we will leave the door open for the present.

LEO V. FINN resumed.

Cross-examination Continued.

By Mr. Johnson:

Q. Mr. Finn, when the Court rose last evening, we were discussing the matter of the exclusion of certain Hawaiian [fol. 2954] figures, and I wasn't getting too far as to why they had been excluded, so I should like to ask a few more questions on that.

As I recall it, sir, you said that figures that were excluded were those of American Can Company; is that correct?

A. That's correct.

Q. However, the figures for cans produced in Hawaii by others than American Can were included; is that correct?

A. They are included; yes, sir.

Q. And the principal—

The Court: In other words, that, as I recall it, 92 million units or number of units for 1957 was only American Can, and there were other cans produced in Hawaii by corporations other than American; is that correct?

The Witness: That's right, sir.

Q. And the principal producer other than American out there is Hawaiian Pineapple, is it not?

A. I understand it is.

Q. Hawaiian Pineapple is one of the biggest fruit packers in the world, is it not?

A. I think so.

[fol. 2955] Q. And so we are not talking about anything insubstantial here. We are talking about the containers for substantially the whole pineapple pack, isn't that correct?

Mr. McManus: Your Honor, he is testifying to facts that have not been proved here, and I am not sure that that is actually a fact. If he is asking him a question—

The Court: He is asking him a question based on a supposed statement of fact: is this the fact?

Mr. McManus: If it is understood that he is not testifying here—

The Court: Well, if he is testifying here, I am not going

to take his testimony, so you don't have to worry about that.

Mr. McManus: Fine.

By Mr. Johnson:

Q. In any event, anything that Hawaiian Pineapple produced for its own use is included in your figures?

A. Yes, they are.

By the Court:

Q. Have you got any idea, Mr. Witness, in rough terms, round them, how many units of cans Hawaiian Pineapple [fol. 2956] produced in the year 1957?

A. No, sir, I do not.

Q. Do you know whether it was larger or smaller than the number of cans produced by American Can in Hawaii during that year?

A. As to the exact figure, I do not know, but I feel very sure it is much smaller.

Q. Much smaller?

A. Yes, sir.

Q. When you say "much smaller," would it be half as much?

A. I have no way of determining.

The Court: I see.

[fol. 2957] Q. What is the basis for your understanding that it is much more?

A. American Can has three plants out there. I am under the impression that Hawaiian Pineapple only has one.

Q. So you are measuring it by the number of plants?

A. That's right.

Q. Do you know anything about the size of the plant?

A. No, I do not.

Q. Did you try to get figures from Hawaiian Pineapple?

A. I don't recall whether we did or not.

Q. You were just content to include Hawaiian Pineapple in the figures and exclude American Can; is that correct?

A. Well, we didn't have—I didn't have figures for the other company out there.

Q. Did you try to get them?

A. As I say, I don't recall. I am not—I was not the only one on the staff. I think we tried to get off a lot of figures from a lot of different sources and have been unsuccessful in various places we tried. I just don't recall that particular [fol. 2958] incident.

Q. So the best you can do on this is that you do not know whether you tried to get Hawaiian Pineapple figures or not?

A. I don't recall.

Q. Would you turn back, Mr. Finn, to folder A, table 3E?

A. 3E?

Q. Yes. Can you tell from that table what percentage of soft drinks, beverages, packed in the United States in any year, were packed in containers made by Continental Can Company?

A. Well, no, sir, you couldn't tell from this statement.

Q. In the last column on that table, after Continental Can Company, there is a figure of 6.2

A. Yes, sir.

Q. What does that figure represent?

A. That figure represents the glass container shipments and the metal container shipments as a per cent of the total soft drink and beverage container shipments in the United States during that year.

Q. Under the heading "metal container shipments," after Continental Can, for 1957 there is a figure of a hundred million, is there not?

A. That's right.

Q. Are those returnable or non-returnable containers, do you know?

A. The metal can shipments?

Q. Yes.

A. Well, generally speaking, they are not returnable.

Q. You say "generally speaking." Is there any exception in that? Why do you qualify your answer?

A. There may be some returnable. I don't know enough about that, if they are. But generally speaking, I think they are all throwaway metal cans.

Q. If you look in the first column under "glass container

shipments," there is a figure following Continental Can of 8,640,000.

A. Yes, sir.

Q. Do you know whether those are returnable or non-returnable bottles?

A. Well, they would include both.

Q. They would include both?

A. Yes.

Q. So here again you have added containers that are used once with containers that are used many times; is that [fol. 2960] correct?

A. We have added these together, yes, some of the containers, returnables and non-returnables.

Q. Would you look down under 1955 to Hazel-Atlas Glass Company?

A. Yes, sir.

Q. Do you find the figure 576,000?

A. Yes, sir.

Q. Do you know whether those are returnable or non-returnable bottles?

A. Offhand, I don't know.

Q. Now, will you look in the last column. After those figures for Hazel-Atlas Company in 1955—

A. Yes, sir.

Q. You have a blank.

A. Yes, sir.

Q. Why the blank?

A. Well, I think the figure will come out less than one-tenth of 1 per cent.

Q. The percentage is just too small to be shown; is that correct?

A. Yes.

Q. Is it correct then that that figure of 6.2 per cent, shown for Continental, would be substantially the same whether [fol. 2961] Continental Can's manufacture of glass bottles for beverage purposes was included or not?

A. I don't believe I understand your question. That 6.2 per cent represents both the glass containers and the metal can shipments.

By the Court:

Q. All right, the question is quite simple, really. How much would the percentage be reduced if you eliminated glass?

A. Well, it wouldn't be reduced too much.

Q. How much do you think it would be reduced? Work it out for me so I can follow.

A. I think it is about 6 per cent.

Q. In other words, it would be two-tenths of a per cent, roughly, more or less?

A. Roughly speaking.

The Court: Yes.

By Mr. Johnson:

Q. For the year 1955, the sum of the percentages attributable to Continental Can and to Hazel-Atlas Glass Company would be absolutely unchanged if you left out Hazel-Atlas would it not?

A. That's right.

The Court: As a matter of fact, you did leave out Hazel-Atlas in '55.

Mr. Johnson: Hazel-Atlas is included in the list.

The Court: Yes.

Mr. Johnson: But not in percentages.

The Court: Yes, but it isn't included in the percentages.

Mr. Johnson: But there is no percentage.

By Mr. Johnson:

Q. Of the 8,640,000 containers, glass containers, shown for Continental Can in 1957, do you know what percentage of those were returnable bottles?

A. Offhand, I do not. It is consolidated here.

Q. If this table shows anything, it shows that Continental Can's production of glass containers for soft drinks in 1957 was greater than Hazel-Atlas' production of soft drink containers in 1955, does it not?

A. Yes, it does.

Q. Turn back for a moment to the preceding table, which is 3D.

The Court: 3C?

Mr. Johnson: 3D.

The Witness: 3D.

Q. Here in 1957 the figure given for Continental Can [fol. 2963] metal beer containers was three million six, is it not?

A. Yes, sir.

Q. Were all of those non-returnable containers?

A. I would say definitely, yes.

Q. In the first column you have a figure of 17 million glass containers for beer; do you know whether those were returnable or non-returnable?

A. Offhand, I don't know, sir.

Q. The figure in the last column, following Continental Can, for 1957 is 38.6. I wonder if you could do the same for me as you did in the preceding table? Tell me how much that percentage would be changed if you left out glass containers?

A. Well, I can tell you offhand. It wouldn't be very much. There wouldn't be very much change there.

Q. Very tiny change; would it not?

A. Yes, very tiny change.

Q. Now, sir, would you look at table 3B in that same book.

The Court: D?

Mr. Johnson: B.

Q. Will you tell me what this table purports to be? [fol. 2963a] A. Yes, sir. This table is consolidations of table 1B and 2AB.

[fol. 2964] Q. Yes. And what does it contain?

A. This is the glass and metal, food, non-food; beer, soft drink and beverage containers for 1955, '56 and '57.

The Court: Let me ask you this, Mr. Witness: What is excluded from this table, if anything?

The Witness: The wine and liquor bottles, sir.

The Court: The wine and liquor. I see.

By Mr. Johnson:

Q. Is that the only thing that is excluded from it?

A. Yes. That's the only thing that is excluded.

Q. So this table, as I understand it, represents all metal containers, however you define them; is that correct?

A. That's right.

Q. And it includes all glass containers except those that were used for liquor and wines?

A. That's right.

Q. And from that you draw a percentage; is that correct?
[fol. 2965] A. That's correct, sir.

Q. Did you know that Hazel-Atlas Glass Company was a substantial producer of wine and liquor bottles?

A. Wine and liquor bottles?

Q. Yes.

A. I think they are.

Q. It shows from the Census materials you had, doesn't it?

A. I don't recall the exact figures, but they do make a substantial number of wine and liquor bottles, yes, sir.

Q. I am somewhat confused about this. I wish you would tell me again why you exclude wine and liquor bottles.

A. Well, there is no comparable category in the metal cans to wine and liquor bottles.

Q. Do you know that Hazel-Atlas Glass Company was not a producer of milk bottles?

A. I think that's right.

Q. That also showed in the Census materials you worked with, didn't it?

A. Yes, sir.

Q. Now, let us see what you have done here. You have excluded one type of glass container that Hazel-Atlas [fol. 2966] made, and you have included a type of glass container that Hazel-Atlas did not make. You have made your comparisons on that inclusion and exclusion; is that correct?

A. Mr. Johnson, I have made the comparisons of all foods, non-foods, beer and beverages. I did not single out any particular or exclude any particular thing.

Q. In other words, except wine and liquor, which you singled out for exclusion?

A. Well, there were no comparable categories in the metal cans.

By the Court:

Q. Let me ask you this, Mr. Finn: Turning to 3 A, 3 A includes everything, doesn't it?

A. Yes, sir, it does.

Q. So there is a table here including all the containers?

A. Yes, there is.

Q. Including milk bottles and beer bottles and wine and liquor bottles and everything else?

A. Yes, sir.

Q. As far as you were able to ascertain?

A. Yes, sir.

[fol. 2967] Q. Now, on table 3 A down in '55, I assume that you included all the production, or shipment, rather, by Hazel-Atlas of milk bottles, wine and liquor bottles and everything that they shipped by way of glass containers; is that right?

A. Yes, sir, in this table are all types, metal, glass and plastic, irrespective of their end use.

Q. All right. Let me ask you this: Take table 3 B. Do you know how the figure of 25.5 per cent next to Continental Can, listed against Continental Can for the year 1957, would be affected if you included in the totals of glass container shipments all the wine and liquor, which would bring it up to 20,153,088, and included in that, in the Continental Can figures, all the wine and liquor glass bottles that they sold through the Hazel-Atlas Division?

A. Well, your Honor, on page 3 A we have included the wine and liquor bottles, and it does show a difference in the percentage of those glass and cans. When I have excluded—

Q. I see. In other words, what you have done on table 3 A is just what I said?

A. Yes, sir.

Q. I see. And that would change the percentage ascribed [fol. 2968] to Continental Can from 25.5 to 24.8, or a total of 7/10 of a per cent?

A. That's correct, sir.

The Court: I am frank to say, Mr. McManus, I don't see what table 3 B is supposed to establish as compared with table 3 A or what possible significance it can have.

The Witness: Your Honor, may I answer that?

The Court: Of course. Surely.

The Witness: Your Honor, 3 B was really put in here because there is a consolidation of these other tables. It makes—

The Court: In other words, this is the first table of a series of breakdowns?

The Witness: That's right. It makes it easier to follow through these tabulations.

The Court: I see. All right.

By Mr. Johnson:

Q. Now, 3 A, like your other tables where you made these consolidations, has added returnable containers and non-returnable containers, has it not?

A. Yes. We have added them both together.

Q. Mr. Finn, the Court yesterday asked you some questions with respect to the makeup of these unit figures for [fol. 2969] cans, and asked you to suppose that Continental Can was making only baby food cans, and asked you if your formula would be appropriate on that assumption. As I read the transcript last night, it seemed to me that you did not entirely get the point of his Honor's question, and I would like to go over again just what you did to get a figure using the figures—for example, the figure on table 3 C.

The Court: What page is that, Mr. Johnson?

Mr. Johnson: 18.

The Court: No, the transcript page.

Mr. Johnson: In the transcript, page 2936.

Q. I would like you to look at the first figure under the heading "Metal container shipments, food containers, 1957" on page 3 C, the figure of 25 billion-and-something.

A. Yes, sir.

The Court: 379 million.

Mr. Johnson: Yes, sir.

Q. Now, first, I think you will agree with me that you did not get that figure from Can Manufacturers: is that correct?

[fol. 2970] A. That's correct.

Q. Then, if I remember what you said, you took Can Manufacturers Institute's figure of the number of containers which might have been made from the tin consumed in all of the several Census categories to which you referred, those being the food categories plus coffee; is that correct?

A. That's correct.

Q. Then you divided that total by the total number of tons of steel consumed by all of the reporting companies for all of those categories; is that correct?

A. That's correct.

Q. And all of the reporting companies in this instance included companies making cans for their own use, including Campbell's Soup Company, Borden's, Pet Milk, Carnation, did it not?

A. Yes. You are speaking now of the total?

Q. Of the total.

A. Yes, sir. You are right.

Q. Still talking about that figure at the top of the column?

A. Yes.

Q. Now, the cans made by those companies, Campbell's [fol. 2971] Soup, Borden's—

The Court: You are talking about these captive companies?

Mr. Johnson: These particular captive companies, Campbell's Soup, etc.

Q. Those cans are smaller than the fruit and vegetable cans, are they not?

A. I think they are.

Q. Now, as a result of your division as you have explained it, you got a conversion factor, and you applied that conversion factor, I think you said, to the tons of steel which Continental had used and those tons of steel had

previously been converted from basic boxes; is that correct?

A. That's correct.

Q. Now, isn't it true that the larger the number of small cans which were made by companies other than Continental, the larger would be the estimate of the number of cans made by Continental?

A. I don't believe I follow your question.

The Witness: Would you read it again, Mr. Reporter.

Mr. Johnson: All right, sir. This gets a little complicated.

[fol. 2972] Q. Let me give you an example. Assume for the moment three companies. One company, A, made 10 cans out of one pound of steel. Company B made 10 cans out of one pound of steel. And company C made four cans out of one pound of steel. What would be your conversion factor in that case?

A. Well, the conversion factor—

Q. Can you answer that question?

A. —would be the total—

Q. Can't you answer that question?

Mr. McManus: I think he was getting ready to answer it, if you will leave him alone.

The Court: He was going to answer it.

Q. Go ahead.

A. We would use the conversion factor for all three companies, if we were interested in an industry total.

Q. Well, if I understand what you did, and you have just agreed with me that that is what you did, you would add together the number of cans made by those three companies, would you not?

A. That's right.

Q. And so you would get 24 cans made through three pounds of steel, wouldn't you?

[fol. 2973] A. Yes, sir.

Q. And your conversion factor would be eight, the way you have done it here, wouldn't it?

A. That's right.

Q. Now, just change the assumption a little bit. Take the same three companies. The first company made 15 cans out of one pound of steel, and the second company

made 15 cans out of one pound of steel, and the third company made six cans out of one pound of steel. What would be your conversion factor in that case?

A. Well, we would do the same thing.

Q. What would your conversion factor be?

A. Well, it would be the total of the three companies divided by three.

The Court: Twelve?

The Witness: Twelve.

By Mr. Johnson:

Q. So don't you agree with me that the larger the number of small cans that are included in your conversion factor, the larger will be your conversion factor?

A. Yes.

Q. And so the larger the number of small cans that you have included made by others than Continental, the [fol. 2974] larger will not be the unit figure assigned to Continental, will it not?

A. Yes.

The Court: Now, wait a minute. That is—

Mr. Johnson: I am sorry, your Honor. It is a little bit—

The Court: Wouldn't that be assumed? I think you have got to redefine your question. Let me have the question.

By Mr. Johnson:

Q. Isn't it true that the larger the number of small cans which were made by companies other than Continental, the larger will be the number of cans assigned to Continental?

[fol. 2975] The Court: Only, I think, Mr. Johnson, assuming that Continental doesn't make even smaller cans than the other fellow.

Mr. Johnson: Yes, I agree with that. He has already indicated, however, that the cans of the companies included within his totals were manufacturers—of small cans.

The Court: Were some manufacturers of small cans.

All right, go ahead.

By Mr. Johnson:

Q. Now, those companies, the milk companies and the soup companies—

Mr. Handler: Was the question answered?

The Court: Well, I think that what happened was, I broke in and we had a colloquy between Mr. Johnson and myself. I think we will consider the question withdrawn momentarily.

Mr. Johnson: Well, I am sure this becomes very important. I am afraid I will have to go back.

The Court: All right, I was just trying to get the record straight so that you can move forward from there.

Q. If you assume, as his Honor said, that the cans [fol. 2976] manufactured by the soup companies and the milk companies are smaller than those manufactured by Continental, then is it not true that the more of those small cans which are included in your formula, the larger will be the estimate of the number of cans made by Continental?

Mr. McManus: Your Honor, before he answers, I would like to know is there any proof going to be offered on this? I mean, I don't mind him going off in this never never land and discussing these theoretical problems with Mr. Finn. But if that is—

The Court: Mr. McManus, if he has been going into the never never land, I haven't been there with him.

Mr. McManus: All right, sir, I will be quiet then.

Q. Can you now answer that question?

A. Mr. Johnson, these figures I have, these conversion factors I have taken, came from the Can Manufacturers Institute. They worked up these.

Q. Mr. Finn, these conversion factors do not come from the Can Manufacturers Institute. We established that yesterday. You have added together some aggregates used by Can Manufacturers Institute, have you not?

[fol. 2977] A. The units are from Can Manufacturers, and so is the tons of steel that was consumed to make these cans. We merely did a division, one into the other, and came out with a conversion figure, which was applied in this case.

Q. And you—

A. Now, I don't know all the ramifications that the Can Manufacturers went into to arrive at these figures. I so stated that yesterday. I don't know whether some companies make large cans or small cans or what size particular cans they make. I think I testified here yesterday that the three companies that we have in here make a general line of cans.

Q. Yes, but that has no bearing on this problem.

The Court: Well, now, look, don't get into arguments with the witness, Mr. Johnson. You ask him questions.

Mr. Johnson: All right, sir.

Q. Let me get the answer to this question: Is it not true, Mr. Finn, that the conversion formula that you created out of the CMI figures is a formula which is not used by CMI?

A. That's right.

Mr. Johnson: I wonder if we could go back and have [fol. 2978] the reporter read my last phrasing of the question with respect to the inclusion of small cans, to which I don't believe I have an answer as yet.

(The question was then read as follows:

"Q. If you assume, as, his Honor said, that the cans manufactured by the soup companies and the milk companies are smaller than those manufactured by Continental, then is it not true that the more of those small cans which are included in your formula, the larger will be the estimate of the number of cans made by Continental?")

A. It may change the total or the percentages in some manner.

Q. You can't answer the question yes or no?

A. No, I can't.

Q. Will you refer to G1202 for identification? I want to refer you to page 11. In the center of the page you find the total food 24,000,900,000, do you not?

A. That's right, sir.

Q. And to that figure you have added coffee.

A. Yes.

Q. In the following line. And that is the figure from which you worked in order to establish a conversion

[fol. 2979] factor for your all good table; is that correct?

A. That is correct.

Q. And in so doing you used the aggregate of each of those categories rather than the individual conversion rate for each category; is that correct?

A. That is correct, sir.

Q. Now page 11 is headed, is it not, "Actual number of cans which might have been produced from the amount of steel consumed"?

A. That is correct.

Q. Now, will you look at page 10? That page is headed, is it not, "Number of No. 2 cans which might have been produced from the amount of steel consumed"?

A. Yes, sir.

Q. And that page has a similar set of categories—the same set of categories as page 11, does it not?

A. Yes, it does.

Q. Now, if you will look—

The Court: Tell me this: What is a No. 2 can, if anybody knows that? What size is that? Roughly, is it the standard sort, the can I always think of primarily as a can of tomatoes, is that a No. 2 can, or a can of peas, is [fol. 2980] that a No. 2 can? Or is that over-simplifying it?

Mr. Johnson: I understand it is roughly in the neighborhood of a pint.

The Court: All right.

Q. Now, would you agree with me that from these two tables the number of cans which might have been produced has been calculated in two different ways?

A. Yes, sir.

Q. If you look on page 11, following the fruit and vegetable category for 1957, you see a figure of thirteen billion nine for the so-called actual number of cans.

A. Yes, sir.

Q. And on the other page, on the computation of No. 2 cans, there is a figure of just over 13 billion.

A. Yes, sir.

Q. Would that indicate to you that the fruit and vegetable cans, referred to on page 11, are fairly close to the size of a No. 2 can?

A. Yes, it would.

Q. All right, sir. Now, if you look at the next figure on page 11, the figure following evaporated and condensed milk, you find a figure of three billion some- [fol. 2981] thing?

A. Yes, sir.

Q. On page 10, following evaporated and condensed milk, you find a figure of less than two billion; is that true?

A. That is correct.

Q. Would that indicate to you that the evaporated and condensed milk cans were substantially smaller than the No. 2 cans?

A. Yes, it would.

Q. Now the same thing is true with respect to other dairy products, is it not?

A. I think the opposite would be true.

The Court: The opposite is true.

Mr. Johnson: That is correct.

Q. Now, except for the fruit and vegetables and all other food, evaporated and condensed milk is the largest item that goes into that total, is it not?

A. Yes, sir; it is. It is the third largest item.

Q. Have you seen Mr. Tolton's charts on the amount of evaporated and condensed milk containers manufactured by others than American, National and Continental Can?

[fol. 2982] A. I have seen them, but I don't recall the details, or anything like that.

Q. I refer to the third table under category II in Government's Exhibit 800 for identification.

The Court: 1955 evaporated and condensed milk?

Mr. Johnson: Yes, sir.

Q. That table indicates, does it not, that over 80 per cent of the containers for evaporated and condensed milk were manufactured by others than American, Continental and National Can?

A. Yes, sir.

Q. And those are the small containers that we are referring to on page 11 of Government's Exhibit 1202 for identification; is that correct?

A. Yes, that is the figure of 3,181,207,000.

Q. So that by including those small cans in the aggregate figure from which you obtained your conversion figure, you have increased the number of cans assigned as manufactured by Continental Can, have you not?

The Court: Will you answer that question?

A. In that particular category, we have.

Q. And that is the same category that you have used [fol. 2983] all through these tables to get this hypothetical figure of number of cans manufactured, is it not?

A. When I spoke of category, I meant the evaporated milk category.

Q. It affects all of the figures, does it not?

A. Yes, it would.

Q. It affects every one without exception?

A. Yes, it would.

Q. I think you indicated yesterday that you had some reason to believe that Campbell Soup Company might be the third largest can company in the United States; is that correct?

A. That's right, sir.

Q. Now you know that Campbell's Soup Company manufactures these small soup cans in practically endless quantities, don't you?

Mr. McManus: Your Honor, I object to that terminology.

The Court: Sustained.

Q. You know that they manufacture more soup cans than any other type of can, do you not?

A. They put out a lot of soup cans, yes. They manufacture a lot of them, products.

Q. You know that the soup can is smaller than the [fol. 2984] No. 2 can, do you not?

A. Yes, sir.

The Court: There are various sizes of soup cans.

The Witness: I think what Mr. Johnson was referring to was Campbell's Soup can. They generally are of the same size, but there are other can manufacturers—other soup companies that put them out in various size cans.

Q. Just so we clear up one minor point: The Can Manu-

facturers Institute, whatever else they do, does not compute any figures for individual companies, does it?

A. I have never seen it.

Q. In the published material that we have been working with?

A. No, sir.

Q. Now looking again at Government's 1202 for identification, which is the Can Manufacturers Institute Bulletin from which you have computed some of your formulas; did you observe the rather odd way in which the Bulletin's table was headed, "Actual number of cans which might have been produced from the amount of steel consumed"? [fol. 2984a] A. Yes, sir.

Q. Did it occur to you to wonder why it was phrased that way?

A. Well, it would indicate to me that it was an estimate. [fol. 2985] Q. Did it indicate to you that it was an estimate?

A. Yes, it does.

Q. Is it not true that there is no estimate of number of cans in any category produced in this document?

A. It indicates to me it is their best estimate.

Q. Doesn't it indicate simply that that is the number of cans which might have been produced and that it is not even an estimate of the number that were produced?

A. Well, I would say it is still an estimate.

Q. You find no difference between a statement of a number which might have been produced and an estimate; is that right?

A. The terminology is different, but I think that you can read into either one of them that it is an estimate.

Q. Well, are the computations on page 10 an estimate? That is headed "Number of No. 2 cans which might have been produced from the amount of steel consumed."

A. Well, that is an estimated assumption that all steel was consumed and placed in No. 2 cans. It is still an estimate. [fol. 2986] mate.

Q. So you would say that that is an estimate, that it was an estimate on page 10 of the number of No. 2 cans which were produced; is that right?

A. Can I see that a minute? I mean, I am confused—you are referring to the table on page 10?

Q. Page 10, that's right.

A. It is still an estimate of the cans which might have been produced from the amount of steel consumed, No. 2 cans.

Q. An estimate of those which might have been produced, yes.

A. Yes.

Q. It is not an estimate of the number that were produced, is it?

A. That's right.

Q. Nor is page 11 an estimate of the number that were produced, is it?

A. To that extent, no, it is not.

Q. In short, there is no estimate in this book as to the number of cans that were produced, is there?

A. That were produced?

Q. Yes.

[fol. 2987] A. No, sir.

The Court: All right. We will take our morning recess.

(Short recess.)

The Court: Before you resume, I have a couple of questions I would like to ask Mr. Finn.

By the Court:

Q. Mr. Finn, on table 2C, in folder A, you will first note—wait a minute. We have got them mixed up. I will take mine, and this is yours.

I note on the last line of that note you say unit shipments were estimated on the basis of 9,237 food cans per ton for '55, 9,254 food cans per ton for '56, and 9,248 food cans per ton for '57. Can you account for the variation in those three years between the number of food cans per ton used? Why should it be different from year to year?

A. I presume, sir, the Can Manufacturers Institute changed their computations from year to year. We divided those out and we got that variation each year.

Q. But you have no explanation for that variation?

A. No, sir.

Q. You don't know how it came about or what caused the [fol. 2988] variation?

A. No, sir, I did not delve into that with the Can Manufacturers Institute.

Q. Now let me ask you another question: Is there any reason why you could not have prepared these tables in terms of base boxes?

A. Well, your Honor, I couldn't very well compare base boxes of steel to units of glass containers.

Q. Well, certainly with respect to the cans that is, the canning part, is there any reason why you couldn't have prepared the tables dealing with canning on base boxes of steel so as to show, for instance, a comparison between what might be called the three or four or five leading people in the industry?

A. I think, your Honor, you will find that in our chart tabulations, where both the metal cans are by tons of steel and the glass containers are by gross of units. So we have done that in the chart tabulations.

Q. But the reason why you went through this conversion process was in an attempt to get figures which could be compared with and were of the same general unit as in the glass industry?

A. That is correct, sir.

[fol. 2989] The Court: All right.

By Mr. Johnson:

Q. You gave one possible explanation of why these conversion figures varied from year to year, and you attributed it, as I understand it, to possible changes in the methods of the Can Manufacturers Institute.

A. That's right.

Q. Is there not another possibility, that that change results from your using a statistical method that Can Manufacturers Institute never uses?

A. Well, I used the same method in each of the three years, and I came out with a different conversion factor for each of those years.

Q. Yes, you did, and you added together all of these aggregates. You added together all of these categories?

A. Yes, sir.

Q. And you got from that a conversion factor?

A. Yes, sir.

Q. And that is a method, I understand from your earlier answer you agree with me, that Can Manufacturers Institute never uses?

A. No; the conversion factor, no, sir, they never use it.

[fol. 2990] - Q. So the change in figure from year to year can be the result of a different product mix, can it not?

A. I don't know what to attribute the difference to.

Mr. Johnson: Your Honor, during the recess I have picked up from some of the defendants' proposed exhibits Defendants' Exhibit 113 for identification, which is a No. 2 can. I am informed it holds approximately 22 ounces.

The Court: That would be the normal can of peas, wouldn't it, or something of that sort? It is a very common fruit and vegetable container.

Mr. Johnson: Defendants' Exhibit 105 for identification is a soup container, that we have referred to, which holds about 10 ounces.

The Court: For instance, that would be, as you understand it, roughly what Campbell's soup would be packed in?

Mr. Johnson: Yes, sir, that is what I believe from their use of the term as a typical Campbell's soup can.

And Defendants' Exhibit 122 for identification is a can of evaporated milk, holding about 13 ounces.

[fol. 2991] The Court: Of course, a condensed milk can is much smaller than that.

Mr. Johnson: Yes, sir.

The Court: Or one type is, anyway.

Mr. Johnson: One type is much smaller than that, yes, sir.

The Court: All right. Thank you.

Mr. Johnson: During the recess, my colleagues asked me to go back to table 3D once more—

The Court: All right. That is the beer container?

Mr. Johnson: That is the beer containers.

The Witness: 3B?

Mr. Johnson: 3D—showing the percentage, the caption—

says, of leading manufacturers of beer containers for 1955, '56 and '57.

By Mr. Johnson:

Q. Now, in the last column under the heading "Per Cent" following "Owen-Illinois Glass Company," you see the figure of 5.6 per cent?

A. For Owens-Illinois Glass?

Q. Yes.

A. Yes, sir.

[fol. 2992] Q. Now, Owens-Illinois is the largest glass container manufacturer in the United States, is it not?

A. Yes, sir.

Q. And large quantities of beer—a large quantity of beer is sold in glass containers in the United States, is it not?

A. That's right.

Q. Now, sir, I ask you what relation that 5.6 per cent for the largest glass container manufacturer bears to the 38.6 per cent indicated for Continental Can?

Mr. McManus: Your Honor, I think we are getting repetitions here. He has stated, I think a number of times, that this chart indicates the initial sale of either a metal can or a glass container. He is not concerned with what Schlitz Beer does when they get the bottle back from the consumer.

Now, if the defendants want to put a chart like that in, that is all right with us. We will point out the errors in that. But he has stated repeatedly this is the initial sale by the manufacturer of this container to the consumer. That is all that chart shows.

[fol. 2993] The Court: I understand. Go ahead. Will you answer the question, please?

The Witness: Yes.

A. This is the initial sale of beer bottles sold in this particular year, 1957, by Owens-Illinois. It has no relation to the quantity of beer that is—

The Court: That wasn't what he asked you. As I understand it, he asked you what relation this bore to the beer container sales of Continental Can.

Isn't that right?

Mr. Johnson: That's right.

The Court: It is the relation that 5.6 per cent bears to 38-some-odd.

The Witness: That's right.

The Court: What percentage is 5.6 to 38, roughly?

The Witness: Well, it's about a seventh.

The Court: About 1/7.

By Mr. Johnson:

Q. Would you conclude from that that Owens-Illinois beer container production was 1/7 that of Continental Can?

A. Yes, it is 1/7 of the containers.

Q. Do you find any meaningful relationship in those [fol. 2994] figures?

A. I did, yes, sir.

Q. What meaningful relationship do you find there?

A. Well, the meaningful relationship that I find there is that during that particular year, of the containers sold for beer, Continental sold 38.6 per cent and Owens-Illinois sold 5.6 per cent of them.

Q. Now, if you were to apply a usage factor—

Mr. McManus: Your Honor, I am going to object to applying any usage factor. He didn't do it. We didn't do it and we have been over it.

The Court: No. I will overrule the objection.

By Mr. Johnson:

Q. If you were to apply a usage factor to beer containers manufactured by Owens-Illinois Glass Company, what would happen to the per cent attributable to Owens-Illinois?

A. Well, I presume it would be way up, but I have no way of telling. I haven't done that in this particular case.

Q. Not as a matter of presumption that it would be way [fol. 2995] up, is it?

Mr. McManus: Your Honor, he doesn't know.

The Court: I don't understand how the usage factor can be applied to Owens-Illinois. Owens-Illinois sold so many bottles. It may be that the particular volume of Owens-Illinois sales, because they were selling a re-usable bottle, was very much larger than this percentage indicates.

Mr. Johnson: I am trying to point out the fallacy of comparing returnable containers with non-returnable containers.

Mr. McManus: I object to that, your Honor. There is no fallacy at all. We are talking about initial sales here.

The Court: I don't know whether there is a fallacy or not. I intend to find out. We are exploring that fact.

Will you tell me, Mr. McManus, what the cost of a reusable beer bottle is as compared with a can?

Mr. McManus: I believe I can—well, I can say this, your Honor. It is my impression—I would have to check it and I think I could—that the can is more expensive.

The Court: Then the reusable beer bottle?

[fol. 2996] Mr. McManus: That is my impression. Now, I could be wrong.

The Court: All right.

Mr. McManus: I don't know. I would have to check.

The Court: If that be so, I don't know how the can people stay in business in the beer industry, but maybe they do. If you get a bottle which is re-usable 25 times and your can costs just as much as the re-usable bottle, the economics of this whole deal rather puzzle me.

All right. We are dealing with economics.

Mr. McManus: I am not arguing that, your Honor.

Mr. Johnson: I suggest, sir, that the matter of markets and customer preferences have something to do with that, as I have indicated in my pretrial statement.

Mr. McManus: Your Honor, if he wants to put that in his case, that's fine, but I don't think it is appropriate at this time.

The Court: All right.

By Mr. Johnson:

Q. Will you turn, Mr. Finn, to folder B. I think we had [fol. 2997] started to look at this last evening, and I may have asked you this question and, if I have, I am sorry I have to ask it again: to what the general approach of folder B is.

The Court: Oh, we have been through that a number of times, Mr. Johnson.

Mr. Johnson: Have we, your Honor?

The Court: I think that is quite clear.

Mr. Johnson: There is a division east and west of the—

The Court: Oh, no. I thought you were talking about 3B in folder A.

Mr. Johnson: No, sir. Folder B.

The Court: Folder B. I beg your pardon.

A. I mentioned yesterday that folder B was similar to folder A but was a breakdown between east of the Rocky Mountains and west of the Rocky Mountains for both glass and cans, and the combination of those two.

Q. Looking at table 1A of folder B, the caption of that, I gather, relates to all types of glass and metal containers east of the Rockies for 1955?

A. Yes, sir.

Q. And under the heading "Glass container shipments," [fol. 2998] there is a figure?

A. Yes, sir.

Q. A figure of 17 billion-odd?

A. Yes, sir.

Q. Will you tell me how you got that figure?

A. Well, the Bureau of the Census gives metal can shipments by tonnage in various geographical areas of the United States.

Q. Well, I was directing my attention first to the glass container column.

A. Oh, I am sorry, sir. Well, this data was obtained from the GCMI material for those companies who had plants operating on the West Coast. In addition to that, we sent out a letter and received letters from other companies who were either not members of the GCMI or who do not report to GCMI, and they furnished us material with respect to the shipment of glass containers from their West Coast plants. We totaled those figures, and attributed all that production to plants located west of the Rocky Mountains. We subtracted that from the census of the total figure for the continental United States and arrived at the total figure for the east side of the Rocky Mountains.

[fol. 2999] Q. All right. Then the figure in the next column, the figure of thirty billion-odd, under the heading

"metal container shipments," will you tell me how you got that figure?

A. The Bureau of Census report metal can statistics on tonnage basis, and they also give you geographical areas in which these shipments are made. By adding the Pacific and mountain states areas together, and from that we took the Hawaiian Islands—I should say that the Pacific area also includes Hawaiian Islands—from that we subtracted the Hawaiian Islands, plus the plants of American Can and Continental Can located in the State of Colorado, which is one of the states in the geographical area of census in the mountain areas.

Q. When you say you subtracted Hawaiian Islands, you subtracted the same portion of the Hawaiian Islands that you were referring to before; is that correct?

A. That is correct.

The Court: Only the American Can production.

The Witness: Only the American Can production.

A. (Continuing) By subtracting the Hawaiian Islands for the American Can, and the American Can's production in Colorado, and the production of Continental Can in the [fol. 3000] same state, we arrived at a figure for that west coast area in the United States. We took that figure and subtracted from the continental United States figure all metal cans and arrived at the east of the Rocky Mountains area. That is briefly what we did.

Q. How did you get units out of it?

A. By applying the same conversion factors where appropriate.

Q. In other words, you went through the same process that we have been discussing here this morning, did you?

A. Yes.

Q. Will you turn to table 2A in folder B. This table purports to relate to all types of metal and glass containers west of the Rockies for 1955, does it not?

A. Yes, sir.

Q. Under the heading "metal container shipments," following the name Continental Can, there is a figure of two billion two hundred seventy-seven million; do you see that figure?

A. Yes, sir.

Q. How did you get that figure?

A. Well, that is the figure for those plants of Continental [fol. 3001] Can operating in the west of the Rockies, less that Colorado plant I spoke of.

Q. What Continental Can plants did you regard as west of the Rockies? Can you name them?

A. I can't name them.

Mr. Johnson: Your Honor, I am sorry to have to go into this figure, but the difficulty I have here is that I am not able from any material that we have to reconcile this figure. I would like to ask that the witness be directed to bring in his working material so that we can find out what this figure came from.

The Court: Have you your work papers here, any of them?

The Witness: I have some of them out there, your Honor.

The Court: In other words, this type of figure, which relates to Continental, the defendant here, is of some significance, and I am going to permit Mr. Johnson to go into the question of how this was arrived at. If you want to get any data now together I will be glad to give you an opportunity to do so, Mr. Finn.

Mr. McManus: May I ask a question, your Honor.

The Court: Yes.

[fol. 3002] Mr. McManus: We have a little bit of a problem here, as I see it, in that at least at the present time Mr. Finn should be warned that in this chart there are work papers that might include American or National.

The Court: I understand that. I would gather that there would be that possibility, and we can deal with that problem.

Mr. McManus: Fine, your Honor.

The Court: But I think the work papers ought to be here, and he may be able to refresh his recollection and go through them, so as to inform Mr. Johnson as to how he arrived at this figure of 277,000,000, for example.

Mr. McManus: Yes, sir.

The Witness: Yes, sir; I will be glad to.

The Court: All right, we will take a brief recess now and give you five minutes to get those papers together. Or

would you rather—all right, what we will do, if it is going to take you a little time to assemble—

The Witness: Your Honor, I don't know how far they want to delye into this thing. I hate to do this thing under pressure.

[fol. 3003] The Court: Well, you have got to do it under pressure, because the pressure is on.

But in any event, what I will do now, I will take a recess to 2 o'clock, give you a chance to go through some of your papers and try and prepare yourself on this.

Mr. Austern: Your Honor.

The Court: Yes, sir.

Mr. Austern: If the Court please, as I heard this discussion, if these questions are going to relate to where the witness attributed the base box reported shipments from a particular plant of either company, geographically, in other words, if it is going to deal with where did you put plant X, east or west, and will not get into the numbers of the plant, I don't think there will be any difficulty as far as these work sheets are concerned.

The Court: Very good, very good. Thank you.

But in any event, you will get this material together and we will resume at 2 o'clock.

Now once that is done, Mr. Johnson, where do we go from here, and where do you envisage a terminal point?

Mr. Johnson: I have a fair amount of material left on [fol. 3004] this witness. It has gone much slower than I thought it would this morning.

The Court: Well, it seems to me that at the rate we are going, if you have a lot of material, I have got to rise at 4 o'clock this afternoon because of the Trinity religious service on the courts.

Mr. McManus: Do you want that on the record?

The Court: Yes, nothing wrong with that.

Mr. McManus: Fine.

The Court: It isn't as if I was saying I was going out to a corner saloon.

Mr. McManus: I realized that after you said it, your Honor.

The Court: So that I would like it, if you can finish with this witness this afternoon, Mr. Johnson, before 4 o'clock.

Mr. Johnson: I will make every attempt to.
The Court: Very good.

(Luncheon recess to 2 P.M.)

[fol. 3005]

AFTERNOON SESSION

2 P.M.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. McManus: Your Honor, before Mr. Johnson starts, there are two matters that I could take up with you that will only take a moment.

The Court: Fine.

Mr. McManus: We do have this problem, in that, as I told you, there is a Dr. Hughes from Wesleyan University, who is going to attempt to put four of our plastic charts in evidence, and apparently we have stipulated them, I understand, with the defendants about the basic data, what the people if called would testify to. He has come down a number of times, and we have been unfortunate in not being able to get him on.

What I would like to do, if we could agree upon a time certain to put him on—because I have taken him away from his—

The Court: All right. We will put Dr. Hughes on at 10:30—

Mr. McManus: Unfortunately, your Honor, Thursday is such a bad day for him. He has apparently got a faculty meeting or something. I don't know if they think Mr. [fol. 3006] Tolton's time will run over Thursday—

The Court: I will ask Mr. Johnson. How much besides Hughes have you got on Thursday, Mr. McManus?

Mr. McManus: I would think, other than Dr. Hughes, it would be an hour at the most. It would be an offer of documents, which I think wouldn't take over an hour. It might be less, but I would think not over that.

The Court: I would say that we are going to take the rest of the afternoon with this gentleman. I would not think that Mr. Johnson would be occupied all day with the man on charts. Maybe he would.

Mr. Johnson: I don't know. I would hope not, but I don't know.

The Court: Well, I would hope not, too, Mr. Johnson.

Mr. Johnson: Some of this is pretty slow.

The Court: But if you've got an hour, let's say, and Mr. Johnson takes the chart man, I have then got to rule on these various charts after I hear them all. I suppose we can say, although it seems to me we are proceeding at a more leisurely pace than I had hoped we would here.
[fol. 3007] Mr. McManus: That is right.

The Court: —if you could have everything finished but Hughes, then we could put Hughes on on Friday morning. But I am not going to have then, if we do that, I am not going to hear argument on Friday, because Mr. Handler has asked for a day, and I propose to give him an uninterrupted day. The subject matter is of that importance. So we will go as long as we can on Friday, as long as we've got material to occupy us, and then we will start arguments on Monday.

Mr. McManus: All right, your Honor.

Mr. Johnson: While we are talking about time, your Honor, when would you like to hear argument on the open question of the documents relating to prior acquisitions?

The Court: Well, I would presume that we could hear that on Friday. In other words, my theory is that between now and Friday, we ought to have the plaintiff's case complete, with all the rulings that are necessary to make it complete, and if there is argument on that subject, on the prior acquisition question, it would seem to me that we can probably hear that on Friday.

Mr. McManus: Yes, your Honor.

[fol. 3008] Mr. Hughes: Your Honor, I think it would be helpful, too, if the government would let us know in advance which of the remaining documents they intend to offer, because just the mechanical task of getting them out and refreshing ourselves on them takes a little time, and it would expedite it if they would give us some indication.

The Court: I think that is a reasonable request.

Mr. McManus: Yes, sir.

Mr. Hughes: When could we have that?

Mr. McManus: Will someone be in your office tomorrow morning?

Mr. Hughes: Yes.

Mr. McManus: If I can't get it to you before tonight, I

will give it to you early in the morning. Will that be satisfactory?

Mr. Hughes: Yes.

Mr. Handler: Your Honor, this is a minor matter that you might want to take off the record or not—I don't know—but this has to do with the argument.

The Court: I don't think we need this on the record.

(Discussion off the record.)

[fol. 3009] The Court: Back on the record.

Mr. McManus: Mr. Finn went back and checked some of his basic data and came to the conclusion that in certain of the charts west of the Rockies there probably is an understatement of Continental's position. Now, I don't think that should really seriously hamper the further cross-examination of Mr. Finn, because he will explain, and I assume the defendants want to know, how he arrives at these figures, and we returned these figures over to defendants, as you recall, last May, one of the purposes being so we could get together on errors of this nature, or at least I understood that to be one of the reasons. They apparently missed it, or at least did not call it to my attention. So if it is possible, if we could continue on with Mr. Finn on cross-examination, and any errors that might be made we would be glad to correct them and give them to the defendants tomorrow, which I understand is an off court day.

Is that satisfactory?

The Court: I take it you will have some redirect of Mr. Finn?

Mr. McManus: Yes, your Honor.

The Court: All right.

[fol. 3010] Mr. Johnson: Well, do I understand the suggestion to be that at this point we are going to get another set of amendments to these tables?

Mr. McManus: Your Honor, as I said, my understanding was that you did not want to concern yourself with additions or subtractions, or errors in additions or subtractions, and that was one of the reasons you directed me to give these tables to the defendants. The defendants have never called to my attention any error that he might have made in addition, and we made two obvious ones, one previously which we corrected in these tables, and this one,

which they should have noted, and I think probably have, but have not called to my attention.

Now, we don't intend to change the approach to these tables or the basic tables. We do believe that we have in the west coast understated their position, which may affect the east coast. I am not sure. But we would like to at least have the tables accurate, and that is what we would propose to do.

The Court: Let me put it this way: If you desire to make corrections of the tables because of mathematical errors in the table, then I think that you ought to have prepared [fol. 3011] some sort of piece of paper which illustrates precisely what the correction is and what the net result is on the particular figure, and see that the defendant gets that tomorrow morning, and then take it up on redirect with the witness.

Mr. McManus: All right, your Honor.

Mr. Johnson: I want to call your Honor's attention to the fact that we did have a certificate of a Certified Public Accountant furnished to us, stating that these computations were correct.

The Court: Well, I am unable to judge at this point just what the nature of the error which Mr. McManus is.

Mr. Johnson: I understand that, but I did want to call that fact to your attention.

The Court: All right.

Mr. Johnson: With that then, some of the lines of questioning that I intended to go into will have to go over until I see what the nature of these corrections are.

The Court: No, I think we will go right ahead.

Mr. Johnson: I will go ahead on other things.

The Court: No, I think you will go right ahead. I want [fol. 3012] to know if there are any errors in these charts, and I think if you are prepared to bring out any errors in there I wouldn't change my procedure one jot or one fidbit.

Mr. Johnson: All right, sir, I can go a certain distance.

The Court: I would go just as far as I would before, myself.

Mr. Johnson: All right.

LEO V. FINN, resumed.

Cross-examination Continued.

By Mr. Johnson:

Q. Mr. Finn, we were looking at table 2A in folder B, and we were looking at the figure of two billion, two hundred seventy-seven million, under "metal container shipments." Would you tell me which plants of Continental Can you took into consideration in arriving at that figure?

A. Yes, sir. The plants at Portland; Oregon; Oakland, California; Stockton, California; Wallawalla, Washington; Los Angeles, California; San Jose, California; Seattle, Washington; and Sacramento, California.

Q. That is all?

A. That is all.

Q. You did not include the plant at Terminal Island, in California?

[fol. 3013] A. No, we left that one out.

Q. Is that the nature of the mistake that Mr. McManus was talking about?

A. That is the error.

Q. Were the figures for Terminal Island left out entirely, or were they put east of the Rockies?

A. No, they were left out of the west coast.

Q. They were left out of the west coast?

A. Yes, sir.

Q. But were they added to the east of the Rockies?

A. No, sir.

Q. Do I understand you to say then that in correcting these figures there will be no changes made for the east of the Rockies?

A. Mr. Johnson, I naturally haven't had a chance, an opportunity, to look over all the figures in east side. The west side is, as I say, we left out a plant there. It might affect the east. At the present time I don't think it does, but I would like to have an opportunity to recheck that.

Q. Now, Mr. Finn, in making the computations relating to American Can and National Can, you have done the same form of computations that you did with respect to Continental Can; is that correct?

[fol. 3014] A. Yes, sir.

Q. With respect to those, I think you are aware that I have never seen the basic figures from which you worked? Do you know this arrangement under which we have been working?

A. Yes, for American Can and National Can.

Q. Can you tell me, Mr. Finn, any way by which I could ascertain from this material whether you might have made the same kind of mistake or other mistakes on the American Can or National Can material?

A. If you didn't have the basic material, no. I don't see how you could.

Q. And the accountant checked it out and said everything had been done right?

A. The accountant checked my figures. He didn't go beyond or back of my work sheets.

Q. Your figures are now disclosed to be wrong.

A. Yes, we left out plant there on the west coast.

By the Court:

Q. Well, let me ask you this: Take American Can. As I understand it, you have got figures from the Census Bureau on American Can which were disclosed; is that right?

[fol. 3015] A. Yes, sir.

Q. And did the accountant, the impartial accountant, who did the checking, did he have access to those on a confidential basis, too?

A. Well, no, sir, he checked my work sheets, sir.

Q. Let me ask you this: what are your work sheets? I don't understand it.

A. My work sheets show the plants that we used to arrive at the west coast market. With due respect to the accountant, he did not go beyond my work sheets.

The Court: Let me ask you this—this is a general question—am I correct, gentlemen, in assuming that everybody knows what plants American Can has in various parts of the country? There is no doubt about that, is there?

Mr. Johnson: No secret about that, I believe.

The Court: So we are not treading on dangerous ground when we find out how many plants American Can has in a certain number of western states, are we?

Mr. Austern: Excuse me, sir. Perhaps I can solve your problem very quickly.

Mr. Johnson: Before you do, Mr. Austern, your Honor, I wonder if this isn't a matter that we should talk to you [fol. 3016] about in chambers?

The Court: All right, maybe it would be just as well. As a matter of super precaution I suppose so.

(The following took place in the robing room.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I take it, Mr. Johnson, for instance, you are anxious to find out what plants he included within the American Can total for the west, are you?

Mr. Johnson: I have a more difficult problem than that. I assumed that the witness would testify that he included in the west those plants which are in the west. I believed that he would have testified the same thing this morning with respect to Continental Can, and it was only because I had some means of checking—at least if not means of checking, of inability to reconcile the figures—that I could determine that there was something wrong with that.

The Court: Mr. Johnson, you can't tell me that Continental Can Company does not know where all the plants that American Can has on the west coast are.

Mr. Johnson: I do, sir. I think you probably missed my [fol. 3017] point. It is easy to determine where the American Can plants are, but there is no way that I can tell from these figures whether he has actually treated American Can plants west of the Rockies or not, as distinguished from his saying he has.

The Court: I see.

Mr. Johnson: His table purported to show that he had treated all Continental Can plants west of the Rockies as being west of the Rockies. I could determine—

The Court: Then you asked him for a list of plants, and he listed the plants, and you said, "Where is the Terminal Island one?" And he said, "It isn't here." All right.

Mr. Johnson: He said that because I focused on the problem of there being something wrong with it. I am not able to focus on the American Can plants.

The Court: Suppose you asked him what American Can plants he included in the west coast figures.

Mr. Johnson: I would get a figure which I would have no way of checking.

The Court: All right. It seems to me that there is a perfectly simple way of checking, and that is to take this [fol. 3018] data, cover the parts that contain any figures at all and simply see what the list of plants is.

We are not dealing here, it seems to me, Mr. Johnson, with a fellow who is deliberately concocting figures out of the air.

Mr. Johnson: I am not so much concerned at this point about his concocting figures as to what he has done by being able to check this one point. I disclosed that his figures were wrong and that he had not done what he said he had done, that is, he had not treated all Continental Can plants which are west of the Rockies as east of the Rockies.

The Court: As west of the Rockies.

Mr. Johnson: As west of the Rockies. I am sorry.

The Court: What is your proposal? What do you desire to do, with respect to the cross-examination?

Mr. Johnson: I don't know how to solve the problem short of seeing American Can's figures.

The Court: I am not going to let you see American Can's figures. That is out. So you better devise some other system.

Mr. Johnson: I don't think I have anything else to offer. I think, however, that the best I can do, then, is leave the [fol. 3019] inference that there is no reliability in these figures.

The Court: That may be. I think you can also proceed to find out what American Can plants he included.

Mr. Johnson: I can do that, yes.

The Court: And I think that you can also ask him to show on his notes, on the work papers that he used on this thing, where all those plants are listed, and I think that can be done without disclosing anything, except the names of plants which you already know, and it will not affect American Can at all.

Mr. Johnson: The method by which he has arrived at these figures is too complicated to make that feasible. I can never state from these sheets what he has done, as I understand it.

Here are the west coast plants, starting with Los Angeles.

Maybe there is no purpose being served putting this on the record, since it won't show—

The Court: All right. Let us go off the record.

(Discussion off the record.)

Mr. McManus: Your Honor, if we could go on the record—

The Court: All right.

[fol. 3020] Mr. McManus: I would like to state one thing which may be of some help. Mr. Finn grabbed my arm before I came in and said he wanted to make a correction in one of the answers that he had given, I believe to either Mr. Johnson or you, in which he was asked if the Certified Public Accountant, Mr. Hook, had seen the basic data from American and National.

The Court: Yes. I asked him that question.

Mr. McManus: Yes. And he said, no. And he grabbed me by the arm when we came in, and he said he wanted to correct his statement, that for American and National he had handed the basic data, and the Certified Public Accountant had worked off the basic data for him, but not for Continental, and the reason he had given him his work sheets for Continental was because he had the work sheets, and they could check, as obviously they had here, and made an error on their computation.

So the addition that was done by Mr. Hook for American and National was done by the Certified Public Accountant.

The Court: That has been checked, in other words, by the Certified Public Accountant.

Mr. McManus: From the basic data.

[fol. 3021] The Court: And certified—from the basic data—that it is correct mathematically.

Mr. McManus: Yes, your Honor.

The Court: All right. That only means, then, it seems to me, the problem is whether the proper basic data was included, and if we are going into that, then plainly Mr. Johnson is entitled to ask him whether or not, in the basic data, what plants did he designate as west coast plants.

Mr. McManus: He will be glad to answer that.

The Court: He will be glad to do that. He can show them on the work sheets, without trespassing as all, as I see it—and I am waiting to hear an anguished protest from

you, sir (addressing Mr. Austern)—without trespassing on the toes of American Can Company.

Mr. Austern: As has been amply illustrated uptown, your Honor, the rôle of a non-partisan neutralist is difficult.

First, this is not my problem alone but also that of Mr. Goldberg, who unfortunately is not here. Secondly, up to this last explanation, I was baffled. I had understood that your Honor had directed that the use made of the data furnished by Continental and American was to be independently checked.

[fol. 3022] The Court: That is right.

Mr. Austern: Now, so long as they had made a division, east and west, I had assumed up to a few minutes ago that the division of these factories and their numbers, east and west, had been done. Now, as I understand the statement of counsel as opposed to that of the witness, it had not been done. I am not clear on that.

The Court: Yes. As I understand it from Mr. McManus, it has been done. Now, we will re-verify that under oath by the witness and permit him to correct his answer, if that is appropriate.

Mr. Austern: By that same token, I appreciate my brother Johnson's problem that having checked something by additions and subtractions both horizontally and vertically and through this tortuous conversion, he has ascertained to his own satisfaction that something was in the wrong place, and I sympathize with that problem.

I know of no way in which he could perform that same operation on either National's or American's figures without having the numbers and adding them horizontally, vertically, aggregating and going through this conversion. That presents the dilemma.

[fol. 3023] I have only this suggestion, and that is that somebody reexamine what this accountant is supposed to have done, and if his certificate does satisfy your Honor that—

The Court: Is there a certificate from the accountant?

Mr. McManus: Yes, your Honor.

The Court: Let me see it.

Mr. Austern: I have never seen it.

The Court: Let us have a look at the accountant's certificate right now.

Mr. Austern: Off the record—

(Discussion off the record.)

The Court: Back on the record.

According to the accountant's audit opinion, which is going to be marked for identification, at least, because we may be referring to it, the accountants, Messrs. Samuel R. Hook & Company of Washington, say:

"We had for basic first information schedules submitted by the American Can Company and National Can Company to the United States Government, listing shipments from various plants in the continental United States and Hawaii, in quantity of base boxes and by type of can for each of the years 1955, 1956 [fol. 3024] and 1957. We assume that the base box figures for Continental Can had been furnished to the government and are as shown in the plaintiff's statistical tables."

So there is a difference between the accountant's knowledge of the Continental figures, which come from the papers shown to them by the government, and the American Can and National Can Company figures which result from the basic data itself.

"We did not have similar schedules"—as the accountant says—"from Continental Can as were furnished by American Can and National Can."

So it seems to me that if one is prepared to say that the CPA, an independent CPA, did a competent, professional job, there are various ways on cross-examination of dealing with the question of groupings of figures or plants or types of categories and plants, without ever going to the figures themselves, because assuming that the grouping is correct, then it follows a fortiori that the mathematics are correct. Now, is there anything wrong with that?

Of course, per contra, if the groupings are incorrect, the mathematics are a fortiori incorrect also.

[fol. 3025] Mr. Johnson: Well, sir, I will ask the witness a couple of questions about this, and we will get on as best we can.

The Court: All right.

Now, we will do this when we go in. I will have the clerk mark this. You gentlemen, of course, have copies.

Mr. Johnson: I have a copy. I think it may be in the file.

Mr. McManus: If not, I think we have another one, if you need it.

(The trial thereupon resumed in the courtroom.)

The Court: Gentlemen, I hold in my hand what is the original of a report by Samuel R. Hook & Company, Certified Public Accountants, Washington, with respect to certain audits that they did at plaintiff's statistical tables, including an analysis of shipments of metal containers east of the Rockies and west of the Rockies for the year 1955. Do you want to mark that as a government's exhibit for identification?

Mr. McManus: That is perfectly satisfactory, your Honor.

(Marked Government's Exhibit 1204 for identification.)

[fol. 3026] The Court: Now, Mr. Witness, I asked you before we took this recess or adjourned to the robing room whether Samuel R. Hook & Company had had before them in checking your statistical tables the schedules submitted by the American Can Company and National Can Company to the United States Government, listing shipments from various plants in the continental United States and Hawaii in quantity of base boxes and type of cans for the years 1955, '56 and '57. Your answer to that, as I recall it, was no and that they only had before them your working papers.

Is that a correct answer?

The Witness: No, your Honor. I was under the impression that you had mentioned Continental Can. They did not have the data that was obtained by the government in response to a subpoena. They did have the underlying data from American Can and National Can.

The Court: Those were the so-called Census reports that you are talking about?

The Witness: Yes, sir.

The Court: For the three years, 1955, '56 and '57; is that right?

[fol. 3027] The Witness: That's right. Yes, sir.

The Court: All right. Go ahead, Mr. Johnson.

By Mr. Johnson:

Q. Mr. Finn, looking at table 1A in folder B, under the heading of metal container shipments, there is a figure relating to American Can Company shipments of metal containers east of the Rockies. Do you see that figure?

A. Yes, sir.

Q. How was that figure arrived at?

A. Do I understand you mean totals, sir?

Q. No. The figure relating to American Can Company.

The Court: 12,056,000,000.

Mr. Johnson: Yes, sir.

A. Oh, that's from the basic data of American Can.

Q. Now, this—

A. And applies only to the plants located east of the Rocky Mountains.

Q. How were the plants of American which are east of the Rockies selected?

A. By their geographical location.

Q. Was this figure arrived at by building up the totals [fol. 3028] of the American Can plants east of the Rockies or was it arrived at, as I thought you testified this morning, by deducting the figures relating to the west?

A. No. The totals are the plants, plants east of the Rockies and by plants west of the Rockies.

Q. I understand that, sir, but I was under the impression—and I may be wrong—that you said this morning, with respect to Continental Can, that the total for east of the Rockies was obtained by deducting the production of shipments of plants west of the Rockies from the total. Is that what you said this morning?

A. I could have, but there would be two ways that you could obtain that.

[fol. 3029] Q. Which did you do?

A. I don't recall. I think we did it by plants.

Q. You think you did it by plants?

A. Yes, sir.

Q. Would you look at the note in the front of folder B? I direct your attention to the third paragraph, under the heading "note applicable to the metal can tabulations in sections 3 and 4 of folder B."

A: Well, I have to stand corrected, sir.

Q. Having read that note, you conclude, do you, that the figure for east of the Rockies was arrived at by subtraction process?

A. Yes.

Q. I understood from the audit report, referred to as G-1204 for identification, that the audit report, or that the audit, in checking material, says that it was done the other way. Will you look at the first full sentence on page 2?

A. Yes, sir. He, I think, was applying, was referring to American Can and National Can, which he has audited here.

Q. But your note at the beginning of these tables refers to all of the companies, does it not?

[fol. 3030] A. Yes, there is no qualification on the companies in my note, sir.

Q. Am I to conclude, sir, that you did it one way and the auditor checked it another way?

A. That could be possible.

Q. Would you tell me which of American Can's plants you regarded as west of the Rockies?

A. They have a plant in Stockton, San Diego, Harbor, California; Oakland, Los Angeles, California; San Jose, Pacific, which is located in California; Portland, Sacramento, Seattle—I think that is all.

Q. Salem? Do you treat Salem as east or west?

A. Salem? I don't find a Salem listed on my list here?

Q. You don't find Salem on your list?

A. No, sir.

Q. The ones you have listed are the only ones that you treated as west of the Rockies; is that correct?

A. That is correct.

Q. Which of National Can's plants did you treat as west of the Rockies?

A. Sunnyville, California; Los Angeles, California; San Leandro, Modesto. They have a plant listed here for [fol. 3031] Stockton, but they produced no—at which they produced no cans in 1955.

Q. What did they produce at Stockton?

A. Sir?

Q. What did they produce at Stockton?

A. I say, they listed no cans produced at Stockton.

Q. They listed no cans?

A. That's right.

Q. Now, Mr. Finn, since apparently you constructed these figures one way and the accountant constructed them another way, I have no way of checking whether you were working on the same thing, have you?

A. You have no way of checking?

Q. Yes.

A. No, I don't suppose you have.

The Court: You mean apart—

Mr. Johnson: Absent seeing the underlying material, yes, sir.

The Court: No, absent seeing the underlying material and absent the accountant's report.

Mr. Johnson: I have just established with the witness that the accountant did it one way and he did it another.

[fol. 3032] Mr. McManus: Your Honor, I think it appropriate at this time that we know what the results were. Did they check out the same? I think that is important.

Mr. Johnson: I am prepared to accept the answer that I have. The witness agrees with me that I am not able to check from this material whether material was accurately done or not.

The Court: You mean whether the accountant did it accurately.

Mr. Johnson: The witness—

The Court: All right, I think we will accept that you can't tell whether the accountant did it accurately or not.

Mr. Johnson: The witness agrees with me that the accountant did it one way and that he did it another.

Isn't that correct?

The Witness: Yes, that could be correct.

Mr. McManus: Your Honor, I don't know why we are

playing here. What we are trying to find out is did they both come out the same? I mean, you can check figures six different ways, and presumably if they both come out the same the figures are accurate. I don't know why [fol. 3033] we have to beat around the bush.

Q. Do you know whether American Can has a plant in Salem or not?

A. At the present time?

Q. At the present time or at the time of these figures?

A. I said it didn't appear on my—on this particular list here.

Q. So therefore it is not included in your west, at any rate; is that correct?

A. That's right.

Q. And if American Can has a plant in Salem, wherever Salem might be, it does not appear with your west of the Rocky figures; is that correct?

A. That's right.

Mr. Johnson: Excuse me one moment.

The Court: Can counsel for American Can tell us where, which Salem, if any, American has a plant at?

Mr. Austern: Is this for the information of the Court or am I testifying? I am somewhat embarrassed.

The Court: The Court will take any information of that nature that you can give us.

[fol. 3034] Mr. Austern: The only Salem that I know of, sir, in which a can plant exists is Salem, Oregon.

The Court: Salem, Oregon.

I take it counsel for neither of the parties are inclined to question.

Mr. McManus: The only thing is, would he further mind telling us how long that has been in existence?

The Court: Do you know that?

Mr. McManus: And was it on his original list?

Mr. Austern: I find it on the list of '56, furnished to the government. I find it on the list of '57. I find it on the list—not on the list of '55.

The Court: Thank you very much.

Mr. Austern: My role as a witness is an unaccustomed one, your Honor.

The Court: You are doing all right.

Mr. McManus: Could I have a clarification of what period of time Mr. Johnson was asking about when he asked about Salem?

The Court: No, not at this time. If you want to bring that out on redirect, that is your privilege.

[fol. 3035] Mr. McManus: All right, Judge.

By Mr. Johnson:

Q. How did you treat the plant of American Can Company at Ogden? Did you treat that as east or west?

Mr. McManus: Your Honor, could we have a time period, please?

Q. In the preparation of these totals we are talking about?

Mr. McManus: But for what period of time? These tables refer to different dates.

The Court: Well, he is asking about the tables, generally. If there is some exception to be made with respect to different years, the witness can tell us about it.

Mr. McManus: All right.

A. The Ogden plant is located in the mountain area states, and the Ogden plant would also be in the west market.

Q. That is in addition to the list you gave me earlier; is that correct?

A. Yes, sir; that is correct.

Q. Are there any other plants you want to add to that now, or subtract from it?

A. There is another plant located in the mountain area, [fol. 3036] Denver, which was—

Q. Which I think you told us earlier you had subtracted from the west?

A. Yes, that is included in the east.

Q. I so understood. Mr. Finn, would you now turn to table 2A?

The Court: Before you leave that, Mr. Finn, you testified that you did not have on your list of plants west of the Rockies a plant in Salem, Oregon; is that correct?

The Witness: That's right, sir.

The Court: Did you not have that on your list for any of the three years these tables cover here?

The Witness: No, sir. It is on a list for 1956 and 1957.

The Court: But not on the list for '55.

The Witness: No, sir.

By Mr. Johnson:

Q. Will you look at table 2A, Mr. Finn? This is a table for all types of glass and metal containers west of the Rockies for 1955. Under the heading, "glass container shipments," there is a figure of 2,109,000,000. Are the shipments of Gallo Wine included in that figure?

[fol. 3037] The Court: On which table? Excuse me.

Mr. Johnson: This is 2A, in folder B.

The Court: Thank you.

A. Gallo Wine is not in this.

Q. Gallo Wine is not included?

A. No.

Q. Why is it not included?

A. It was a captive plant, and we had no data from them, and I don't think it was in existence in 1955.

Q. Table 2 in that same book refers to shipments of glass and metal, non-food west of the Rockies. Would I be correct, Mr. Finn, if I concluded that both a one-ounce perfume bottle and a five-quart oil can would be included in this category, if they were made west of the Rockies?

A. Yes, sir; it is all—all types of glass, both, metal, in the non-food category would include all those.

Q. Will you look at table 1F, which is a glass and metal non-food category for east of the Rockies for 1955?

A. Yes.

Q. In the first column is the figure given for Hazel-Atlas [fol. 3038] Glass Company. Does that figure include home canning jars?

A. Yes, sir.

Q. Home canning jars made by Hazel-Atlas are included as non-food jars; is that correct?

A. Oh, I'm sorry. I was looking—I saw food. No, the home canning jars would be under category of food.

Q. Are they in this instance? If you aren't sure, is there any way you can check it?

A. Well, I haven't checked. I could check back on it.

Q. Can you do that, sir?

A. Well, I could, but it would take a little time. You see, we are dealing in units here.

I can't tell now precisely whether it is in food or is in non-food.

The Court: All right, let's go, let's move forward.

Q. So I am left without an answer as to whether it is in food or non-food; is that right?

The Court: Yes, that's right.

A. Yes, that's right, sir.

Q. How about the home canning containers of Kerr, in [fol. 3039] cluded in the table for west of the Rockies? Are they treated as food or non-food?

A. Kerr made no home canning in 1955 in the west coast?

Q. I see. You are sure of that?

A. It is not listed on the letter they have from them.

Q. And that is the only information you have?

A. That's right.

Q. You don't know though, do you, whether they included their home canning jars as food, included that with that figure that you have from them?

A. No, I do not.

Q. Now, Mr. Finn, would you turn to table 2C. This is in your folder C, which is Government's 803 for identification. What does that table purport to be.

A. 2C purports to be production and shipments of Crown Caps by Continental Can Company compared to the United States total for the years 1955, '56 and '57.

Q. Down at the bottom, toward the bottom of the table, there is a line headed "all other manufacturers." Can you tell me who are included in that category?

A. Well, I don't have the list before me, but it would be companies like Crown Cork and Seal and Anchor-Hocking, [fol. 3040] Guttman—I don't recall the rest of them.

Q. Did you compute the percentage for any of the others?

A. No, sir.

Q. Can you tell me whether they are larger or smaller, or any of them are larger or smaller than Continental?

A. I don't know.

The Court: Wait a minute. I don't follow your question. Are you referring to the line on 1C?

Mr. Johnson: 2C. I'm sorry.

The Court: I'm sorry. All right.

Mr. McManus: I would like to object to the form of the question, your Honor. He asked Mr. Finn if any of the companies were larger.

In what way do you mean larger, Mr. Johnson?

Q. You have computed in that table, as I understand it, for 1955 Continental Can production, Continental Can per cent of total for the United States of shipments as 17.1 per cent. Do you know what if any companies in the United States, producing and shipping Crown caps, have a larger percentage of shipments than that percentage?

A. I don't know. I have never seen any data from [fol. 3041] those other companies.

Q. Did you try to get any data from the other companies?

A. I don't recall.

The Court: From all that appears here, Mr. Finn, as far as I can see, there might be four companies in this field—might be five companies in this field, who are all larger than Continental; is that right?

The Witness: Could be, your Honor.

Q. Does this table include exports?

A. I don't think that the data we got from Census lists exports. It doesn't distinguish between exports and domestic consumption.

Q. Do you know if the Continental figure includes exports?

A. No, I do not.

Q. Would you turn now to table 1C in that same exhibit. Can you tell me what that table is?

A. This is a continental United States shipment of metal containers for sale by the three leading manufacturers, excluding metal container shipments by captive plants, and this is in short tons of steel consumed.

Q. Now what is the purpose of excluding captive plants from this table?

[fol. 3042] A. Oh, to show the volume of metal cans that are for sale in the United States.

Q. I think you testified earlier that Sherwin Williams

manufactures cans both for its own and sells cans on the outside; is that correct?

A. That is correct.

Q. Are Sherwin Williams cans included in this table?

A. I have no way of telling. You see, I have no underlying data with respect to this table.

Q. So you don't know whether or not Sherwin Williams cans have been included or excluded from this table?

A. Since these are Census statistics, I presume they are in there.

Q. But you can't tell me how they are treated?

A. No, sir.

Q. We have testimony here earlier that a subsidiary of Hunt Foods sold cans for its parent company. Do you know whether those cans are included or excluded from this table?

A. I presume they are included. I have no way—I do not have the underlying data of all the companies that are included or in this tabulation.

[fol. 3043] A. 5 B?

Mr. McManus: D.

A. This says, "Comparison of Glass Container Plants East and West of the Rocky Mountains for the Years 1920, 1938, and January 31, 1960."

Q. Why did you select 1920 as the starting date?

A. That was the only information I could find available in that particular year.

Q. In that particular year?

A. Well, I started as far back as I could.

Q. What is the magic about 1920?

A. It was the first year given in this tabulation I was able to find.

Q. Were you trying to find the earliest year possible? Is that what you were trying to do?

A. Not necessarily so.

Q. Well, sir, in the record in the Hartford Empire case, there was a tabulation going back to 1885. Why didn't you use that?

A. Well, this tabulation was all set out for me in the

TNEC hearings. It started with 1920 and it ended with 1938.

Q. And that is the only reason for choosing 1920?

A. I believe so.

[fol. 3044] Q. Are you saying, sir, you can't tell what this percentage figure relates to? You have a per cent under the heading "Continental Can for 1956," 37.6 per cent. Do you know whether that is a per cent of a total that includes Sherwin-Williams and United Can & Glass? Or is it a per cent of a figure that excludes it?

A. Well, I presume if a company sells cans that it makes and at the same time uses some, they give a breakdown to the Bureau of the Census of the volume they have used and the volume they haven't, that they have sold. I presume that is the method of treating that.

Q. And that is your presumption. That's the best you know it?

A. Yes, sir.

Q. Mr. Finn, will you turn to table 5 D.

Mr. Johnson: Your Honor, I apologize, but there is nothing I can do except go through a mass of details to show what has been done on these pages.

Q. (Continuing): What is that table, Mr. Finn?

A. The title of this table is the "Value of Packaging Material".

Q. No. I am referring to 5 D.

[fol. 3045] Q. Do you know when prohibition went into effect?

A. I have a general idea. My father happened to be in the brewery business at the time.

Q. About when?

A. Sir?

Q. About when?

A. About 1917—it was '17 or '19.

The Court: Well, it was '17 first, statutorily, as I recall, and then it was '19, constitutionally.

By Mr. Johnson:

Q. Do you think that event would have any bearing on the existence of glass container companies shortly after 1920?

A. I really don't know.

Q. On your note to this table, Mr. Finn, you say that you eliminated Pennsylvania Glass Products Company because the company doesn't manufacture containers in any large quantity; is that right?

A. Yes, sir.

Q. Do you have any information as to how many or what particular amount Pennsylvania Glass Products Company manufactured containers?

[fol. 3046] A. I think we have the statement from the owner, Pennsylvania Glass Products.

Q. Am I to conclude from your answer that you don't know how many containers they manufactured?

A. Precisely, no, sir.

The Court: Let me ask you something, Mr. Witness. In statement 5 D, you referred to information from the Pennsylvania Glass Company.

Has that information been made available to the defendant?

Mr. McManus: I am not sure if it has or not, your Honor, but we will be glad to, if we have not.

The Court: I mean, this chart—what about Mr. Johnson? Have you had available to you this investigation of concentration of economic power hearing?

Mr. Johnson: I have available the TNEC report.

The Court: I see.

Mr. Johnson: I do not have available the material to which Mr. Finn just referred. However, let me ask some questions about this, and maybe I will get at what I want without that.

The Court: All right.

[fol. 3047] By Mr. Johnson:

Q. Mr. Finn, this table is essentially a comparison of the number of plants at three different periods, is it not?

A. That's right.

Q. And that is what you were trying to do, trying to compare the number in 1920 and the number in 1938 with the number in 1960?

A. Yes, sir.

Q. Now, this table does not purport to show anything about the size of plants, does it?

A. No, sir.

Q. Or anything about production?

A. Nothing in production.

Q. Capacity?

A. Nothing about capacity.

Q. Now, you eliminated from the 1960 list some companies because you say they did not manufacture containers in any large quantity?

A. Yes, sir.

Q. Did you eliminate any companies from the 1920 or 1938 list for that reason?

A. No, I did not.

Q. Did you try to find out whether any of the companies [fol. 3048] included in your 1938 or 1920 listing were either insignificant or inactive?

A. I attempted to find out something about them, but I was unable to.

Q. Did you read this TNEC source book to see what it said about them?

A. No, I don't think I did.

Mr. Johnson: Will you mark this book for identification?

(Defendants' Exhibit W marked for identification.)

The Court: May I ask, Mr. McManus, what is the purpose of 5 D? Why is it offered? What is it intended to show?

Mr. McManus: Your Honor, we believe it shows not only the number of plants but it also shows the number of operating companies in 1960, and that they have decreased from 80 in 1920 to 29 in 1960, and that this is an industry which is gradually becoming more concentrated in four hands. Although—

The Court: Is that the purpose?

Mr. McManus: Yes, your Honor.

The Court: It seems to me, Mr. McManus, an awfully sketchy way of showing this. Well, anyway, go ahead.

[fol. 3049] Q. Is Defendants' Exhibit W for identification the TNEC source book to which you referred?

A. Yes, sir.

Mr. Johnson: Does your Honor wish to see it?

The Court: Not at this point, no.

Q. Now, if you will look at—

By the Court:

Q. Let me ask you this: Suppose between 1938 and 1960—25 companies which had formerly purchased glass containers set up plants of their own for glass container manufacture. Would that be reflected in any way in this figure, in this chart, 5 D?

A. Well, I can't tell in 1920 or 1938. It would be in 1960.

Q. Well, I note that Gallo Glass Company has been eliminated in 1960 because you say it does not sell glass containers.

A: Yes, sir, it was in the Glass Factory Directory, from which I made this particular column up, but I had noted here, I have eliminated it because it did not sell glass containers.

Q. Did you mean to say that as you reviewed the Glass [fol. 3050] Container Directory for 1960 it only has 29 companies in it?

A. Well, they don't give it by companies, sir. They give it by plants.

Q. Then they list 87 plants in operation?

A. Eighty-seven plants.

Q. How do you arrive at 29 companies?

A. We did that by listing the companies and their subsidiary companies under them. We eliminated the subsidiaries and just counted the major companies.

Q. Well, now, you did that. Where did you get the information from?

A. Well, we got it from several sources, sir. For instance, Anchor-Hocking, here, all through here I have

mentioned Maywood, they had two plants in Baltimore. Carl Lowry and Swinburn Bros., they are subsidiaries of Anchor-Hocking, and we just treated Anchor-Hocking as just one company.

The Court: All right. I believe we have had some testimony on Anchor-Hocking.

Mr. Johnson: Yes, sir.

By the Court:

Q. That is Anchor-Hocking. What did you do with other companies? You didn't have testimony—

[fol. 3051] Mr. Johnson: Perhaps, your Honor, I could ask some questions as to how this table was constructed. Perhaps we will get some answers.

The Court: All right.

By Mr. Johnson:

Q. His Honor referred to Gallo Glass Company, which you say you excluded from the 1960 list.

A. Yes, sir.

Q. And you excluded it because you say it does not sell glass; is that the idea?

A. That's right.

Q. Page 808 of your source book, Defendants' Exhibit W for identification, containing the list of glass plants, indicates a company operated by H. J. Heinz Company at that point.

A. Yes, sir.

Q. Do you know whether H. J. Heinz Company ever sold glass?

A. No, I do not.

Q. But H. J. Heinz Company is included in your 1920 and 1938 list, is it not?

A. Yes.

Q. Now, in your 1960 list, your notes indicate that you counted the Wheaton Companies as one company; is that [fol. 3052] right?

A. Yes, sir.

Q. Do you know how many companies you counted the Knox Glass group as, in 1920 and 1938?

A. In 1938 they were counted as seven companies.

Q. And if you will look at page 810 of your source book, you will see a footnote at the bottom of that page, will you not, which says that they are consolidated in one table for GCA statistics?

A. Yes, sir.

Q. So in 1960, you reduced the companies in existence by counting related companies as a group, and in 1920 and 1938 you increased the number by counting related companies separately?

Mr. McManus: Your Honor, I object.

The Court: Objection overruled.

Mr. McManus: May I explain my objection?

The Court: No.

Mr. McManus: He did not—I don't believe he testified that—

The Court: No.

By Mr. Johnson:

Q. Is that correct?

A. That's correct. But I think somewhere in the TNEC [fol. 3053] hearings you will find that Mr. Underwood, who was then president of Knox Glass Company, stated that these were merely associated companies, and from that we gathered that they were independent companies.

By the Court:

Q. Well, now, what puzzles me, Mr. Witness, is this: In making up this table, were you making judgments on whether companies were in combination or were independent or were affiliated or were subsidiaries or not? Were those your judgments?

A. No, sir, they were staff judgments.

Q. They were staff judgments. In other words, your staff sat there and decided for itself whether companies were independent companies or were subsidiaries or were affiliated or what they were?

A. Not my staff, sir. It was the government staff.

The Court: All right. The government staff.

By Mr. Johnson:

Q. And the government staff decided that they would count the Knox companies in 1938 as seven companies and the Wheaton companies in 1960 as one company; is that correct?

[fol. 3054] A. That is what was decided, sir.

Q. And this is what Mr. McManus means by the decrease of companies in the United States?

A. Well, there are some other points there.

Q. Well, we will go through some of those.

The Court: We will have to do it Thursday morning, gentlemen.

(Thereupon, an adjournment was taken until Thursday, October 13, 1960, at 10:30 a.m.)

[fol. 3055] New York, October 13, 1960, 10:30 A.M.

Trial resumed.

Mr. McManus: Your Honor, before Mr. Johnson starts, Mr. Pedersen is here, sitting in for Mr. Austern, who was unable to come back.

The Court: All right.

Mr. McManus: I think, so that everything here will be clear, if he can explain his position—I am not sure by whom he is employed or where he is employed—so that everyone will understand that there is or isn't any objection to his representing Mr. Austern.

The Court: All right, Mr. Pedersen.

Mr. Pedersen: My name is C. R. Pedersen. I am a member of the New York Bar, and I am assistant counsel to American Can Company. I wanted that known to counsel, that Mr. Austern cannot be here today, and he suggested, with your Honor's permission and counsels' permission [fol. 3056] that I be here in his stead, and subject to your Honor's provisions.

The Court: You have read the transcript?

Mr. Pedersen: I have read the proceedings in your robing room twice, and I understand the conditions under which I am here.

The Court: And you will undertake the same obligations that he undertook at that time?

Mr. Pedersen: Yes, your Honor.

The Court: Very well. Any objections, gentlemen?

Mr. McManus: No objection.

Mr. Johnson: No objection.

The Court: Very good.

Now, what chart are we starting with this morning, or what table, Mr. Johnson?

Mr. Johnson: We are continuing with 5D.

The Court: 5D. Thank you.

Mr. Johnson: However, your Honor, before I begin, I think I should tell you that yesterday, about lunchtime, we were furnished with a list of additional documents that the plaintiff intends to offer on its case, and the list runs in excess of a hundred documents, and I think that that may [fol. 3057] have some bearing on the question of time.

The Court: Yes.

Mr. McManus: Your Honor, when we say "additional documents," I think 97 or 96 of those have already been marked right here.

Mr. Johnson: That's right.

Mr. McManus: They are not new documents.

The Court: I understand that. These are not documents in addition to those that have already been marked, but you intend to offer roughly a hundred additional documents which have already been marked for identification.

Mr. McManus: That's right, sir.

The Court: Very good.

All of which takes a certain amount of time.

Mr. McManus: Yes, your Honor.

LEO V. FINN resumed.

Cross-examination continued.

By Mr. Johnson:

Q. We were talking about table 5D, Mr. Finn, and I was directing your attention to the fact that from the 1960 list you had omitted certain glass companies, which you said did not manufacture glass containers in any large quantity. Now, did you exclude any companies from either the 1920 [fol. 3058] or the 1938 list for that reason?

A. No, I did not, sir.

Q. Now, if you will look at page 806 of Defendant's Exhibit W for identification, which you have identified as the document referred to in your source material, under the heading "Indiana" you will find the name of Hart Glass Manufacturing Company, will you not?

A. Yes, sir.

Q. And that means then that that was included in your account of companies for 1938, doesn't it?

A. Yes.

The Court: What is the name of that, Hartford?

Mr. Johnson: Hart, H-a-r-t, Glass Manufacturing Co.

Q. Now, if you will look on page 621 of the same volume, which is a volume from which you were working, you will find that someone by the name of Mr. Day was testifying, and he says that someone made a suggestion to him, and I quote: "We go out and buy a couple of broken down glass factories." Do you see that quote in the testimony in this source book?

A. Yes, I see it.

[fol. 3059] Q. Then someone asked him something about those glass companies, and he says, and I quote: "I have some notes on a letter taken at the meeting and they were the Hart Glass Company, Dunkirk, Indiana, and another one." See that testimony?

A. I see that.

Q. So that apparently included with your 1938 companies was at least one company that was indicated in your very source material as a broken down glass factory, was there?

A. I included the Hart Glass Company, yes, sir.

Q. But you excluded insignificant companies or companies that you thought were insignificant from the 1960 list; is that correct?

A. Yes, sir; I eliminated several companies here, which I said did not produce in any large quantities, containers.

Q. Now, did you try to find out whether any of the other 1920 or 1938 companies were insignificant?

A. No, sir.

Q. You didn't even go through the rest of the source book to find out whether any others were?

A. I glanced through the source book. I didn't see that particular reference you have.

[fol. 3060] Q. Did you know that the table from which you worked, page 806, had some indication of which companies were less than a hundred thousand gross per year?

A. Yes, I noticed that.

Q. Did you notice that several of the companies which went out of business in the '20s were companies which were indicated as having a size of less than 100,000 gross per year?

A. Yes. I noticed that.

The Court: Is that a hundred thousand gross of containers?

Mr. Johnson: That's right.

The Court: Is that the figure?

Mr. Johnson: That's right, yes, sir.

The Court: You are not talking about dollars?

Mr. Johnson: No, sir. A hundred thousand gross of containers.

By Mr. Johnson:

Q. Now, on page 806 of your source material you will find under "Illinois" a reference to Chicago Heights Company, will you not?

A. Yes.

Q. The Chicago Heights Company is included in your [fol. 3061] table for 1938; is that correct?

A. Yes, it is.

Q. Now, if you will look back on page 875 of your source material, you will find testimony by Mr. Levitt. Mr. Levitt

is testifying, and he says, and I quote, "The Chicago Heights plant is a very small operation, a hand-blown plant."

Now, notwithstanding that, you included it in your 1938 table; is that right?

A. The 1938 and the 1920 tables were never—were not adjusted by me in any respect.

The Court: You just took what was in the tabulation—

The Witness: That's right, sir.

The Court: —of the hearings of the Temporary National Economic Commission?

The Witness: That's right, sir.

By Mr. Johnson:

Q. Now, you say, however, that you tried to do some adjustments, in 1960 at least—

A. Yes.

Q. —by putting together companies and their subsidiaries; is that correct?

A. That's right.

[fol. 3062] Q. Did you try to do that for 1920 or 1938?

A. No, I did not.

Q. In other words, if the source material showed a company and its subsidiary, that was two for 1920 and 1938?

Mr. McManus: I object, your Honor. He just testified he made no adjustment. I think he would have to look at the TNEC for that.

Mr. Johnson: All right. We will do that.

Q. If you look at page 806 of your source book, New York, you will find a company listed for Olean. Do you see that?

A. Yes.

Q. The Acme Glass Company?

A. Yes.

Q. Did you include that in your 1920 and 1938 lists?

A. That's right.

Q. As a separate company?

A. That's right.

Q. Now, near the end of that column you will find a note. Do you see that note with reference to the Olean Company?

A. Yes, I do.

[fol. 3063] Q. And that note is No. 10, I believe, isn't it?

A. Yes.

Q. Now, let's look at note 10. The note 10 says—

A. Thatcher Manufacturing Company.

Q. In other words, that is a subsidiary of Thatcher Manufacturing Company; is that correct?

A. Well, it has reference to Thatcher, and I presume it is a subsidiary.

Mr. McManus: What does the note say?

Mr. Johnson: It says Thatcher Manufacturing.

Mr. McManus: It doesn't say if it is a subsidiary or not.

Mr. Johnson: No.

By Mr. Johnson:

Q. Would you conclude from that whether it was a subsidiary or not?

A. Well—

Mr. McManus: I object, your Honor. He has no basis for concluding one way or the other. He copies from the report. He said that a number of times.

The Court: Well, in the third list he drew certain conclusions, the 1960 list.

Mr. McManus: There is no question about that, your Honor.

The Court: All right. I am going to permit the exploration of what his mental process was in making up the third list, and the only way he can do that is to go through the first and second list.

Q. What did you think that note referring to Thatcher Manufacturing Company meant?

A. Well, to me it meant that Thatcher had an interest in the plant.

Q. You did not pursue it beyond that?

A. No, I did not.

Q. It didn't excite your curiosity at all as to whether it should be counted as one company or two companies?

A. Well, I couldn't tell whether they had a controlling interest or just an interest, but they had reference to Thatcher, and—

Q. You did not think to make inquiry of anyone—

Mr. Johnson: I will withdraw that.

Q. You did not make inquiry about it; is that right?

A. No, because this tabulation is gotten up by a now [fol. 3065] defunct association.

Q. The Thatcher Manufacturing Company is still in existence, isn't it?

A. That's right.

The Court: Tell me, the National Temporary Economic Committee, which I am not familiar with, except as I have heard about it on this trial, was that a committee of congressmen or industrialists or what? What is the committee?

Mr. Johnson: If your Honor would let me try to answer that, I will say this; The Temporary National Economic Committee was a committee that was created by Congress consisting of representatives of Congress and representatives of the various departments of the Executive Branch. It was a joint committee—

The Court: Legislative and Executive?

Mr. Johnson: Legislative and Executive—which held extensive hearings on many aspects of the American economy during the period roughly 1938-1939.

By Mr. Johnson:

Q. Now, Mr. Finn, I want you to look at the lower right-hand corner—

The Court: Another thing: How big was this body? [fol. 3066] Mr. Johnson: The whole committee?

The Court: Yes.

Mr. Johnson: It was a large committee: representatives of the Department of Justice, the Treasury Department, the Securities and Exchange Commission and the Federal Trade Commission—at least those I recall—sat representing the Executive Department.

The Court: Then an appropriate number of congressmen, I take it?

Mr. Johnson: And a large number of congressmen sat on it. Senator O'Mahoney of Wyoming was, I believe, the chairman of the committee.

The Court: Now, this document, which is Defendants' W

for identification, I gather from the title this does not purport to be a report of the committee, does it?

By Mr. Johnson:

Q. Do you know, sir?

A. Reported!

By the Court:

Q. No. I say I assume, if there was a committee—and I have never known a committee that did not make a report [fol. 3067] at some point—that this committee did make a report, did it not?

Q. There have been some very numerous monographs made of the hearings of this committee, and they were made by individuals who served as staff members of the committee, and also some of the Executive Department representatives made reports on it. But as to whether or not there is an existing report made—I don't know—

Q. In other words, you do not know whether the committee itself ever drew any conclusion from these somewhat extensive hearings that it held or made any findings as to what the facts it was supposed to investigate were? Were there any—

A. I can't answer that, sir.

The Court: And the table, what page is that on, Mr. Johnson? Can you find the table for me? What is this—an exhibit?

Mr. Johnson: I would call that whole document, your Honor, the equivalent of a transcript of hearing, I believe.

The Court: I would suppose so.

Now, how did this table get in? Who prepared it? Where did it come from?

[fol. 3068] The Witness: I think the preceding pages, your Honor—it was transmitted to the TNEC by the Glass Manufacturers Association. They prepared it for that committee.

The Court: All right.

By Mr. Johnson:

Q. Now, you don't have any idea of how that table got in there?

A. No, sir. The one in the—

Q. The one in the TNEC report.

A. No, I do not.

Q. I want to direct your attention to table 5 D, in the lower right-hand corner where there is the bold figure of 29.

A. Yes.

Q. And that follows the caption that says, "Number of Companies Operating Plants."

A. Yes, sir.

Q. The other column indicates that that is the number on January 31, 1960; is that right?

A. Yes.

Q. So your intention with that figure is to inform the Court, is it, that on January 31, 1960, there were 29 and only 29 glass companies in the United States operating [fol. 3068a] plants—glass container operating plants; is that right?

A. That's right. If you consider my adjustments I made on the preceding—on the following page.

[fol. 3069] Q. All right, sir. Now, I would like you to go through and name those 29 plants for me one by one, 29 glass container manufacturing companies?

A. There is the Owens-Illinois Glass Company.

Q. Will you go slowly enough so that I can take them all, please? All right, sir.

A. Anchor-Hocking Glass Company; the Hazel-Atlas Division of Continental Can; Knox Glass Company; Brockway Glass Company; Thatcher Glass Manufacturing Company, Incorporated; Ball Brothers Company, Incorporated; Metro Glass Company, Incorporated; Obear-Nester Glass Company.

Q. I'm sorry. Before you leave Metro, is that the same as National Dairy Products Corporation?

A. Yes, sir.

Q. Go ahead, sir.

A. Obear-Nester; Maryland Glass Corporation.

Q. Is that the same as Warner-Lambert?

A. Yes, sir.

Glass Containers Corporation.

Q. Glass Containers Corporation. Is that the same as Hunt Foods, do you know?

A. I think it is.

Fairmount Glass Company; Foster-Forbes Glass Company; [fol. 3070] pany; Glenshaw Glass Company; Pierce Glass Company; Oil City Glass Company; Laurens Glass Works; Chattanooga Glass Company; Diamond Glass Company; Liberty Glass Company; Litchford Glass Company; North-western Glass Company; Armstrong Cork Company; Star City Glass Company; Arkansas Glass Company.

Q. Excuse me one moment. Is Star City a member of another group?

A. You might find it under National Bottle.

Q. National Bottle Corporation. What is the next one after Star City?

A. Arkansas Glass Company; Underwood Glass Company; Alexander Kerr Company; Lamb Glass Company; Wheaton Glass Company.

Q. That is all?

A. Yes.

Q. And those were the only glass container manufacturing companies that you could find in the United States today; is that right?

A. Those are the reference to the 29 companies.

Q. Where did you get that list?

A. From the American Glass Review, Glass Factory Directory—1960.

[fol. 3071] Q. Did you try to check it out with anything else?

A. Oh, I had previous directories. They issue them annually.

Q. When I asked you the other day, with reference to one of your tables, how many companies were included under the caption of "all other manufacturers," in addition to the three companies referred to on that table, you gave an estimate of between 35 and 38, and I refer to page 2882 of the minutes. That would be, adding the other three, a minimum of 38 companies, would it not?

A. A minimum of 38 companies?

Q. You said that you estimated that there were between 35 and 38 included in "all other manufacturers"?

A. Yes, sir.

Q. And there were 3 stated separately on the page, were there not?

A. Yes.

Q. So that would mean at least 41 companies, wouldn't it?

A. Well, what I meant to say was the fact that there were three companies preceding, there were about 35 others. I [fol. 3072] mean a total of 35-37 companies.

Q. Not 29?

A. I was just trying to recall. Yes, there is this distinction: when I mentioned that I was also including subsidiaries belonging to other companies of this 29.

By the Court:

Q. But didn't you tell me, sir, that subsidiaries were listed separately, at least in a number of instances, in the 1938 list?

A. Well, I meant—Mr. Johnson points out here one, that Orleans Glass, which presumably Thatcher had an interest in. As I mentioned, I did not alter the 1938 or—

Q. I understand that, Mr. Finn.

A. Yes, sir.

Q. I had understood from the previous testimony with respect to the Temporary National Economic Committee hearing, that in some instances at least there was one group of at least three companies which were listed separately in that and in a footnote were shown to have some connection with another company, whether by way of subsidiary or interest or whatnot; do you recall that?

[fol. 3073] A. Yes, sir. I was talking about Knox.

Q. There were three there, and one, four, was Orleans. Now that is at least four. Do you know of any others that were treated the same way in the 1938 list?

A. No, sir; I do not. Going back to Mr. Johnson's—

Q. Do you know whether the Gallo Glass Company—was the Gallo Glass Company in existence in '38, do you know?

A. No, it was not.

Q. Was not. But the Gallo Glass Company is not included in this list of yours?

A. That's right, sir.

By Mr. Johnson:

Q. However, the Heintz Company was included in 1938?

A. Yes, as shown by that list.

The Court: Is it true that the Heintz Company at that time was a captive company, in the same sense that the Gallo Glass Company was a captive company, do you know?

The Witness: I have no knowledge.

Q. Now, Mr. Finn, in your count of 29 companies, did you [fol. 3074] include Arrowhead and Puritas Waters Company?

A. No, I did not.

Q. Why didn't you?

A. Frankly, I didn't know anything about them. I never saw them listed.

Q. Why did you exclude Bartless-Collins Company?

A. I don't know whether they are—Bartless-Collins? Bartless-Collins, I don't think, was listed either.

Q. Listed in what?

A. In American Glass Review.

Q. So you just blindly relied on American Glass Review; is that right?

A. Well, that is my source material, sir.

Q. Why did you exclude Castle-Hanson Corporation?

A. Well, we at that time didn't have any knowledge it was functioning.

Q. At what time did you not have any knowledge that it was functioning?

A. When I prepared this.

Q. Do you know that Mr. Cheney testified that Castle-Hanson Corporation was a member of GCMI?

A. Well, I just found that out.

Q. You didn't see fit to correct this chart?

[fol. 3075] A. Well, I haven't corrected this, no, sir.

Q. Why did you not include Glass Products Company, of Vineland, New Jersey?

A. They didn't appear in the directory either.

Q. Why did you not include Goodman-Kleiner Company, of New York?

A. They didn't appear.

Q. Why did you not include Jeannette Glass Company?

Mr. McManus: Your Honor, I object. Is he purporting to read off companies that are operating as glass companies? I have no knowledge. These might be rubber companies. And, also, there is no foundation laid that they are glass companies.

The Court: Now, look, the man who is supposed to be laying a foundation is your witness. The objection is overruled. This witness is supposed to know about this thing. If he knows about them, all right. If he doesn't, then he never heard about them and they are susceptible of being shown that they're operating glass companies, and his table is no good.

Q. Why did you not include Jeannette Glass Company?
[fol. 3076] A. Jeannette?

Q. Yes.

A. They are not listed as a glass container company.

Q. Why did you not include McCoy Glass Company?

A. I don't think they were listed either, sir.

Q. Why did you not include Puerto Rico Glass Corporation, of San Juan, Puerto Rico?

A. Well, this is confined just to the continental United States here. I didn't list them at all.

Q. Why did you not include Universal—

By the Court:

Q. Do you know whether or not the 1938 list was confined to the continental United States?

The Witness: They only listed those states that I have here.

By Mr. Johnson:

Q. Why did you not include Universal Glass Products Company, Parkersburg, West Virginia?

A. Well, they're a subsidiary or controlled by Star City.

Q. You think that—you say that Universal is controlled by Star City?

A. Yes.

[fol. 3077] Q. And that is the reason you exclude it?

A. Did not include it.

By the Court:

Q. Was Universal listed on the list put out by the American Glass Review?

A. Yes, sir; they were.

Q. But you eliminated Universal?

A. That's right.

Q. Despite the fact they were on that list?

A. That's right, sir.

By Mr. Johnson:

Q. Now, in preparing your table and coming to the conclusion that there were 29, only 29, glass container manufacturing plants in the United States, did you check the admissions made by the government in this case in response to the defendants' request to admit?

A. No, I did not.

Q. You didn't even go to that trouble?

A. No, sir.

Q. Now, Mr. Finn, if I may, I would like to turn to table 5C.

The Court: Frankly, Mr. Johnson, at this point there has been, as far as I am aware, no proper foundation laid [fol. 3078] for the admission of table 5C, and I wouldn't at this point waste any time cross-examining about it. At the present writing I do not intend to admit it.

Mr. Johnson: But I would very much like to expose what this witness has done with 5C, your Honor. It has a bearing on the statistical methods that he uses.

The Court: Well, make it relatively brief. I don't propose to spend relatively considerable amount of time on this table, at this stage of the game.

Mr. Johnson: All right, your Honor, I will do that.

Q. The caption of 5C refers to the value of packing materials, Mr. Finn, does it not?

A. Yes, sir.

Q. Do you know whether those are cost figures or sales figures?

A. I do not.

Q. Do you know whether they represent sales at all, or whether they represent production?

A. Well, it is given in the dollar figure.

Q. Still could be a dollar figure and be production figures, could it not?

[fol. 3079] A. Oh, yes.

—By the Court:

Q. Is this table reproduced in the same form in which it appears from Modern Packaging Encyclopedia, issued for 1960, or is this something that you made up from individual items in that Encyclopedia?

A. Your Honor, it is in the same form down through line A there. I think it is three-quarters of the way down.

Q. In other words, these figures—

A. The top.

Q. —from “container or material” down through and including line A?

A. Yes, sir.

Q. Is listed—I say “listed”—is taken—let’s put it that way—is taken from the so-called Modern Packaging Encyclopedia?

A. That’s right.

By Mr. Johnson:

Q. Do you know whether those figures which are given as the value of packaging material relate to the United States or to some other area?

A. I think they are confined to as much of the United States as it is possible to do.

[fol. 3079a] Q. You say they relate to the United States, do you?

A. Yes.

Q. That is your conclusion?

A. I presume so, sir. There is no explanation given for that question in the source material.

[fol. 3080] Q. Now, without going into detail, his Honor commented on what all of these various packaging materials are. I notice that towards the bottom of the sheet you have made some adjustments. Will you tell me what those adjustments are?

A. At the extreme bottom?

Q. Yes.

A. Well; these were items here which we concluded that were not strictly within a packaging and container field.

The Court: You thought these were not within the line of commerce you were trying to establish; is that right?

The Witness: Well, we didn't think they had too much significance in the—rather, did not have a place in this table that is above here, but we didn't think that, for instance, the item of reconditioned barrels and drums should belong in here, so we made that adjustment.

Q. And just what did you do? What was the nature of the adjustment? I mean; just tell me mechanically what you did.

A. I mean; we deducted from the total on line A. We came out with an adjustment.

[fol. 3081] The Court: The adjustment on line C?

The Witness: That's right.

A. (Continuing) And we took the annual net sales and operating revenues and we got a percentage.

Q. Then the whole purpose of this table—

The Court: How do you know, for instance, Mr. Finn, that these figures in the Packaging Institute—whatever it is called, this Packaging Encyclopedia—are annual net sales and operating revenues?

The Witness: Oh, I don't know that, sir.

The Court: In other words, you don't know whether or not you are comparing Continental's annual net sales and operating revenues to annual net sales and operating revenues of the industry or some entirely different standard, do you?

The Witness: That's right, sir.

By Mr. Johnson:

Q. Where did you tell the Continental Can annual net sales and operating figure that you prepared?

A. That's from the annual operating reports of Continental Can, 1957 and 1958.

Q. Did you read those reports at all?

A. Yes.

[fol. 3082] Q. Did you look in those reports to see what those annual net sales and operating revenues were—

A. Yes, sir.

Q. —composed of?

A. Were composed of?

Q. Yes.

A. Yes.

Q. Did you know that they included Canadian sales?

A. Yes, sir.

Q. And you dared compare this figure, which you say—of the packaging industry, you say, of the United States, with Continental Can including Canadian sales?

A. That is what is done here.

Q. And you did it?

A. Yes.

Q. And you are prepared to tell the Court that you did?

A. I say that is what has been done.

Q. Do you think the Court could conclude that from this?

A. Well, I didn't go into the explanation of what all is in that annual report, sir. I said these were the annual net sales and operating revenues of Continental Can. I didn't [fol. 3083] qualify where they were—

Q. Do you know that Cuban sales were in there?

A. Yes, sir.

Q. Did you know that Continental Can's defense sales were in there, non-container defense production?

A. Oh, yes, sir. Everything is in there, I presume.

Q. Sales with woodlands were in there?

A. Yes, sir.

The Court: Sales from what?

Mr. Johnson: Woodlands.

The Court: You mean forest lands?

Mr. Johnson: Yes, sir.

Q. Did that include that?

The Court: May I see that? Do these facts appear from the face of the report that you are alluding to now, Mr. Johnson, such items as you say, woodlands, defense production?

Mr. Johnson: Canadian sales are disclosed.

The Court: Show me that. Show me the item of Canadian sales, will you please? Either one will do.

Mr. Johnson: The '57 statement shows, on page 20, a [fol. 3084] statement of consolidated income.

The Court: All right. Let me look at that.

Mr. Johnson: Yes, sir. The inside cover shows the operating subsidiaries of Continental.

The Court: All right.

By Mr. Johnson:

Q. Did you try to get a breakdown of Continental Can's sales and operating revenues from anyone?

A. Not for this purpose, no, sir.

Q. Now, in making your adjustments, without going into details on that, I notice that one thing you deducted from what you regard as the total value of packaging materials, you deducted packaging machinery; is that right?

A. Yes.

Q. Did you know that Continental Can was a large manufacturer of packaging machinery?

A. I knew they made machinery. I didn't know how much it was.

Q. You knew that they made packaging machinery?

A. Yes.

Q. But you did not make any attempt to adjust the other side, that is, the figure you compared with your total?

[fol. 3085] A. No, sir.

The Court: I think we have gone far enough on this, Mr. Johnson.

Q. Mr. Finn, I have just a couple of other general questions here.

Referring back to your tables, in which you computed what you called the number of units of metal containers manufactured, those figures and every one of those unit figures could not have been constructed without relying on Can Manufacturers Institute material that we have been discussing here in the last several days; is that not correct?

A. Yes, sir. That was the only source I had.

Q. The defendant in this case asked the government during the pretrial proceedings a series of interrogatories. Did you help answer those for the government?

A. Yes, I helped answer a limited number of them.

Q. Would you recall interrogatory 6, in which the defendant asked for the total sales in dollars and in units of

metal cans sold in the United States for each of the years 1953 to 1956, inclusive? Do you recall that?
[fol. 3086] A. No, I don't recall.

Q. Did you ever look at the answers to those interrogatories?

A. Yes, I have.

Q. Did you know that in answering that interrogatory, there was included some figures, and next to them was this note:

"These figures were estimated and published by the Can Manufacturers Institute, Inc. and the plaintiff has no way of verifying their accuracy"?

Did you know that that was in there?

A. Well, I don't recall this, no, sir. I assisted Mr. McManus in giving him some information, sir.

Q. The government put that warning note on its response to interrogatories, but you did not see fit to put any such warning note on any of your tables, did you?

Mr. McManus: Your Honor, I object. In our underlying data on CMI, there is no question but that these are estimates, but we consider these the best estimates and the best way of doing it, to convert them to units. That is obviously a note that these are estimates of CMI.

The Court: Well, the witness will answer the question. [fol. 3087] The objection is overruled.

Mr. McManus: I am sorry, your Honor.

The Court: Do you have the question, Mr. Reporter?

(Question read.)

A. Well, I think I explained rather fully how we arrived at these figures in the pages from time to time.

(Defendants' Exhibit X marked for identification.)

The Court: Exhibit X for identification, I take it, is the interrogatory and the answer to which you just referred?

Mr. Johnson: Yes, sir.

Mr. McManus: I would like the record to show, your Honor, that there is no indication here of the date these were answered.

The Court: That can easily be ascertained.

Mr. McManus: Yes, your Honor, but it is not on the exhibit.

Mr. Johnson: Would you stipulate, Mr. McManus, that Defendants' Exhibit X for identification contains a true copy of defendants' interrogatory 6 and a true copy of plaintiff's answer to interrogatory 6(b)?

[fol. 3088] Mr. McManus: I will so stipulate, subject to a motion to strike in the event that it is not accurate.

The Court: This has not been offered, anyway.

Mr. McManus: Yes, your Honor.

Mr. Johnson: I do want to read again that last sentence in the record.

Mr. McManus: Your Honor, is he going to offer this?

Mr. Johnson: No, sir, not at this point.

Mr. McManus: I mean, reading into the record from a document which is not in evidence.

The Court: It seems to me a very reasonable point.

Mr. Johnson: He has stipulated it is correct.

Mr. McManus: But it is not in evidence.

The Court: If you are going to stipulate that it is correct, you either put it all in or not at all.

Mr. Johnson: Very good, sir. I will reserve on offering it.

[fol. 3089] The Court: Yes.

Mr. Johnson: Does your Honor want to see it at this point?

The Court: No.

Mr. Johnson: I have no further questions of this witness at this time, subject to this: that I have not as yet seen—they are here but they were not here when I started cross examining this morning—the corrections that were referred to on Tuesday.

Mr. McManus: Excuse me. Could I have a clarification of what those corrections are, your Honor? If he is talking about the corrections to the tables—

The Court: Yes.

Mr. McManus: —we delivered those to his office yesterday evening, as soon as we had made the computations.

The Court: What time yesterday evening?

Mr. McManus: Well, it was late yesterday evening, your Honor, around 6 o'clock.

The Court: Well, I would say that Mr. Johnson wouldn't

have had an opportunity to look at those between 6 o'clock yesterday and this morning.

Mr. McManus: May I say something about that, your [fol. 3090] Honor?

As I said before, I feel a little put out about bringing this up at this time because this is taking up time of the Court for things that should rightly have been worked out between counsel. We admit that we made a mistake by not including Terminal Island, California in west of the Rockies. One of the reasons why, going back, as I observed, is that the statistician was working from a copy of a document furnished by Continental Can Company, subject to a motion to produce. The information Terminal Island, California was handwritten. Someone, before giving it to the government—I am sure unintentionally—had clipped the "I" off, so it was "Terminal Island, Ca.," but not understanding that, the statistician interpreted that to be Terminal Island, Georgia—G-a. We did not know. Maybe we should be more careful.

It was quite obvious to the defendants that we had not included Terminal Island, California in our documents for five months, your Honor. In addition to that, they pinpointed it right on the nose when they questioned Mr. Finn.

Now, the only reason I am saying that is that we are [fol. 3091] wasting this Court's time in quibbling over things that amount to one, two or three per cent corrections on documents, some which amount to only 1/10 of one per cent, and we did call our statisticians up from Washington yesterday, spent all day and had those corrected.

I am sorry for the error, your Honor, but I think part of the onus is on the defendants for not calling that to our attention—

The Court: I am not ascribing any blame to anyone at the moment. All I am saying is that there are certain alterations by reason of errors in a table. Now, it is not infrequent that there is some error in as complicated and lengthy tables as these.

Nobody is remotely suggesting that the error was made purposely.

Mr. McManus: Yes, your Honor.

The Court: It is there, and Mr. Johnson will have a right to look at the correction.

Mr. McManus: Now, your Honor, if I could just ask you how you would propose that we make the changes in the documents which your Honor has?

The Court: I haven't seen them.

Mr. McManus: I know, your Honor.

[fol. 3092] The Court: I haven't seen what you supplied the defendant.

Mr. McManus: We have—

Mr. Johnson: Your Honor, before we leave this point, in view of Mr. McManus' statement, I feel impelled to say—

The Court: Look, Mr. Johnson, if you are going to go into further explanation, none of this is affecting the progress of the case at all. All I am concerned with is whether there are figures that need correction at this point. If they do, all right.

Mr. Johnson: I understand. But I did say in pretrial proceedings, the point I want to make, that I was not able to reconcile these figures. Mr. McManus has had that information for months. The pretrial record will show that.

Mr. McManus: Your Honor, if I could show you—the changes in tables appear in folder B, and if I could show you how we—how at the present time we have penciled the changes in on that copy.

What we would suggest, your Honor, if you have no objection, and if the defendants have no objection, is that we would take those corrections and, rather than having the penciled corrections in there, Your Honor, if we could sub— [fol. 3093] stitute the pages subject—

The Court: No. I think it would be, frankly, much better all around to have the present charts marked for identification with the corrections in pencil or ink, as the case may be. Then the record is clear on the corrections that were made, and I think that is part of the record.

I am not saying there is any great significance to be attached to it, but I think it is better to have it done that way.

Mr. McManus: All right, your Honor. Any way that is satisfactory to the Court.

I presume it would be satisfactory to ink them on your copy and initial them—

The Court: Yes; as long as the other side gets a chance to see what the corrections are and has checked the figures, then the corrections can be made in ink on the copy in evi—

dence and on my copy and on the copies of counsel, but I do think that when you make a correction in charts of this nature, the substitution of pages only serves to confuse rather than clarify, unless you can follow the process all the way through.

Now, have you got any redirect?

[fol. 3094] Mr. McManus: Yes, your Honor.

The Court: How long is your redirect going to take?

Mr. McManus: Well, your Honor, I am not exactly sure, but I think not over a half hour.

The Court: Well, suppose we take our morning recess now, and I won't have to interrupt your redirect.

Mr. McManus: Yes, your Honor.

(Short recess.)

The Court: All right, Mr. McManus.

Redirect examination.

By Mr. McManus:

Q. Mr. Finn, in your computations, I believe you testified on cross examination that you attempted to limit your metal can statistics to the continental United States shipments, shipments from continental United States; is that correct?

A. I did.

Q. And you attempted to exclude Hawaiian production?

A. Yes, sir.

Q. And you were able to exclude American Can but you were unable to exclude Hawaiian Pineapple's production; is that correct?

[fol. 3095] Mr. Johnson: I object to that question. He testified he did not try.

The Court: I will overrule the objection.

A. I was able to exclude that in American Can, but not the other.

Q. Now, if you had been able to exclude Hawaiian Pineapple's production, what effect, if any, would that have had on Continental Can Company's share in these charts relating to continental United States, and east and west of the Rockies?

The Court: Let me ask you this: Didn't you tell us you did not know what Hawaiian Pineapple's production was?

The Witness: That's right.

Mr. McManus: He did, your Honor. He said he didn't know and therefore he didn't exclude it.

The Court: If he doesn't know what its production was, how can he possibly testify to what effect it might have in the figure.

Mr. McManus: Your Honor, just this: Mr. Johnson made much of the fact that Hawaiian Pineapple's production was fairly important. If he could have excluded that—that was included—excuse me, their production was included in the [fol. 3095a] Continental United States, the 48 states, because we were not able to exclude it.

[fol. 3096] The Court: Yes, but who knows? Is there anything in the record to show what Hawaiian Pineapple's production was?

Mr. McManus: No, your Honor, there is not.

The Court: From what we know, Hawaiian Pineapple's production might have been a billion units a year.

Mr. McManus: Assume that point, your Honor, if it were a billion units per year and were not included, what effect—I am asking Mr. Finn what effect that would have had on Continental's percentage in the charts that we have here?

A. Well, if I was able to exclude Hawaiian Pineapple, it would have increased the percentage share of Continental Can.

Q. So that the percentage here—

Mr. McManus: I withdraw that.

The Court: Let me follow this, Mr. Finn. Somebody has lost me along the way.

By the Court:

Q. If you had excluded whatever production Hawaiian Pineapple had, you say it would have reduced the continental United States total?

A. Yes, sir.

[fol. 3097] Q. And therefore would have increased by some amount, you don't know how much or how little—

A. No, sir.

Q. —the percentage that you attributed to Continental Can?

A. Yes, sir.

The Court: All right.

Mr. McManus: Now, your Honor, previously hereto you asked in regard to the classifications of food, non-food, beer, soft drinks, and so forth, if there was any material which defined what should be included in those groups, and I said I would attempt to obtain such underlying data.

I have here Government's Exhibit, marked for identification 1205. I have only one copy, unfortunately, which I obtained from the Glass Manufacturers Institute, which in effect lists what is to be included within the various categories.

The Court: That is, in the Glass Container Manufacturers figures.

Mr. McManus: That is correct, your Honor.

Now, I would like to ask Mr. Finn about that, which I think has been covered, but I would like to just clear it up.

[fol. 3098] By Mr. McManus:

Q. Mr. Finn, in comparing the census returns, I think you testified before, of Owens-Illinois, you did have census returns on Owens-Illinois, I believe you testified here before?

A. That's right, sir.

Q. And you also had their returns to GCMI?

A. Yes, sir.

Q. And that was for what period, do you recall?

A. 1955.

Q. And in making that check, taking a category such as beer, what was your conclusion in regard to the figures? Were they the same or were they different?

A. They were identical.

Q. Is that true of other figures, Owens-Illinois, both census returns and GCMI?

A. Yes.

Mr. McManus: Your Honor, we would like to offer Government's Exhibit 1205 as an explanation of the products or type of products that go into the various classifications of census and GCMI.

The Court: Well, did this witness use that document in preparing these tables?

Mr. McManus: He used the GCMI data, your Honor. [fol. 3099] This is an explanation of what is to be included in each one of them.

The Court: What do you say, Mr. Johnson?

Mr. Johnson: This is a GCMI document, and of course, Mr. Cheney has been on here at some length. I would be willing to make no objection to this document on the ground that Mr. Cheney—I would be willing to not object that Mr. Cheney is not called to identify it if the government would be willing to make certain stipulations with respect to it.

The Court: Well, what are they?

Mr. Johnson: That reporting to the GCMI is voluntary; that the GCMI has no way of checking the classifications by its members into these various categories; that it does not actually police the classifications; and that the government has no information as to whether Hazel-Atlas Glass Company actually followed this classification.

Mr. McManus: Well, your Honor, up until the last one I am perfectly willing to stipulate to. I am not too clear on—maybe I would be willing to stipulate on the last one, but I am not too clear what Mr. Johnson means, about—well, I don't know what he means. If he would clarify that, maybe I would be willing to stipulate that.

[fol. 3100] Mr. Johnson: Well, all I mean is, this is a document that is put out by GCMI for the use of its members. I believe that Mr. Cheney would testify that he doesn't know whether his members follow it or not. I believe he would testify that he makes no attempt—

The Court: In other words, he asks his members to follow it, but the institute makes no check to see whether they actually do, and relies on the figures they supply.

Mr. Johnson: That's right.

The Court: All right, with that stipulation, which I think covers the situation, why, the document will be admitted.

(Government's Exhibit 1205 received in evidence.)

Mr. Johnson: I think at this point it might be helpful to know just what the purpose of this document is, what it is to be used for?

The Court: Well, its only purpose, as I understand it, is

to furnish explanation for the tables. Now, the table are not yet in evidence, and I haven't passed on the tables yet. I am admitting it in evidence now as a matter of mechanical [fol. 3101] convenience, so that if, as and when the tables are in, it will be in evidence for the purpose of casting some illumination on them.

That is the only purpose of this, isn't it?

Mr. McManus: Yes, sir; your Honor. You ask me if I would find something—

The Court: Yes, sir; all right.

By Mr. McManus:

Q. Now, Mr. Finn, you did testify that the reports by Owens-Illinois were identical. Did you have a chance to check any of the Hazel-Atlas reports to GCMC and to Census?

A. Yes, sir; we test checked those.

Q. And was there any appreciable error in those two sets of figures?

A. There were some errors, sir, or discrepancies, but they weren't too significant.

Q. When you say not too significant, could you give me the percentage of error, if any, approximately?

A. Well, I would say it was less than one 1 per cent.

Q. Now, you were asked yesterday about Campbell's Soup cans. What is the basis of your knowledge of the type of cans that Campbell's puts its soup in for sale to the public? [fol. 3102] A. Well, merely what I have seen Campbell's soups in, in the regular can, Campbell can. That is the extent of my knowledge about the Campbell Soup Company.

Q. You were also asked about the Sherwin Williams Company; are you familiar with that company?

A. I know of it.

Q. And do you have any idea of the size of that company?

A. Well, I understand it is one of the major paint companies in the United States, if not in the world. They still advertise it.

Q. And your knowledge of how they sell their products would be similar to your knowledge of how Campbell Soups sell their products?

A. That is correct.

Q. Could you tell me in what size, to your knowledge, in what size containers do they sell their products, paint products?

A. Well, paint comes in many size cans.

Q. What sizes?

A. I think from a half a pint up to a gallon, I have seen.

[fol. 3103] Q. And the gallon can is larger than the No. 2 size?

A. Oh, yes.

Q. To your knowledge, does the Bureau of Census report reuse containers for either beer or soft drinks?

A. Not to my knowledge.

Q. Now, if I could direct your attention to—do you have the chart book, the chart book that Mr. Tolton prepared?

A. No, I do not, sir.

Mr. McManus: I am referring to page 26.

The Court: You are talking of 800 for identification?

Mr. McManus: Yes, your Honor. It is Government's Exhibit 800 for identification, page 26.

Mr. Johnson: Will you give me the heading of that, please? I don't have pages in my book.

The Court: "Metal can shipments—'55. Evaporated, condensed milk, and so forth."

Mr. McManus: And it is in section 2.

Mr. Johnson: Thank you.

Mr. McManus: Do you have it, Mr. Johnson?

Mr. Johnson: Yes.

By Mr. McManus:

[fol. 3104] Q. Was that the chart that Mr. Johnson showed to you the other day during cross-examination?

A. I believe it was.

Q. And you were asked if the leading three producers produced 16.3 per cent of all evaporated condensed milk cans?

A. Yes, sir.

Q. Now on that same chart, what share is indicated by Continental Can Company?

A. 16.3 per cent.

Q. And in units, what is it for the leading three? Excuse me. This is in short tons.

A. This is based on short tons, and the leading three have 40,061.

Q. And of that percentage, of that group, what does Continental have?

A. Continental has 39,989 tons.

The Court: Are you drawing the conclusion, from these figures that of the production by the so-called leading three that Continental Can does it all except less than a hundred tons?

Mr. McManus: Yes, your Honor, of the leading three. I would like for you to draw the conclusion that of the leading three, Continental produces just about every one of [fol. 3105] them in evaporated and condensed milk.

Q. And you testified, or the defendants exhibited here, Mr. Finn, that evaporated or condensed milk cans are smaller than a No. 2 can?

A. I think they are.

Q. You were also examined by Mr. Johnson on the plants that you included west of the Rocky Mountains; is that correct?

A. Yes, sir.

Q. And you were asked to list those plants, and you did not list Salem, Oregon; is that correct?

A. That is correct.

Q. What year were you referring to when you omitted the Salem, Oregon, plant of American Can?

A. That was for 1955.

Q. And the charts which are broken down the way we are using them here, east and west of the Rockies, for what year are they concerned?

A. They are only for 1955, only for 1955.

Q. Now, you also testified, Mr. Finn, that you knew some of the companies who manufactured Crown caps, and you listed Crown Cork and Seal, Guttman and Anchor-Hocking. Is that testimony correct?

[fol. 3106] A. No, sir. I didn't mean to say Anchor-Hocking. I meant to say Armstrong Cork Company.

Q. In all of the charts for metal cans that you have prepared for the continental United States, you include—the percentages included in that are the percentages of captive plants, with the exception of chart 1C.

A. Yes. Our totals for the continental United States include all captive facilities. I had no way of excluding those.

Q. If you will go to folder C, chart 1C, or page 2 of Government's Exhibit 803?

A. All right.

Q. Now this chart is in short tons of steel consumed; is that correct?

A. That is correct.

Q. And what is the difference in this chart from the other chart that you have prepared?

A. Well, this is in short tons of steel consumed and the other was in units of cans.

The Court: In other words, the Can Manufacturers Institute conversion figures were not used in this?

The Witness: That is correct, sir.

Q. Is there any other difference in this chart from the [fol. 3107] other charts, Mr. Finn?

A. Well, through this particular one here I was able to exclude the captive facilities as they are reported in the Bureau of Census issues.

Q. And this chart—by "captive," will you tell me what you mean by "captive"? Who would it include, what type?

A. Well, when I speak of "captive," I think they mean the cans are used by the company manufacturing for their own use, to put their own products in.

Q. And could you give me an example of one of those companies, to your knowledge?

A. Well, the Campbell Soup Company.

Q. And the basic data here, in separation of charts which were for captive plants and for non-captive plants, does the Bureau of Census have data referring to reports which are for captive plants excluded and captive plants included?

A. Well, I presume their raw data contains—

Mr. Hughes: I didn't catch that answer.

Mr. McManus: He says he presumes their raw data.

Q. Do they also report in Facts for Industry or any of their other official publications the shipment of metal cans [fol. 3108] from captive plants?

Mr. McManus: I will withdraw that.

Q. What I am getting at, this chart is different from the other charts, you have indicated, because it does not include captive plants; is that correct?

A. My other—this chart does not include captive plants. They are separated out here.

Q. I see. Does the Bureau of Census publish information which separates the captive plants from the totals?

A. You mean by plant description.

Q. Not by individual plants. I am talking about the continental United States as a whole, including Hawaii?

A. Well, they furnish this information I have on page 2. They give you a total amount of steel that was used in captive facilities.

The Court: They have got a separate listing of that?

The Witness: Yes, sir.

Q. Now going to folder B, section 2A, that is page 5, it lists there glass container shipments.

A. Is this 2A?

Q. Yes, 2A in folder B, Government's Exhibit 802.

A. Yes, sir; I have it marked as page 15.

[fol. 3109] Q. Excuse me, I am sorry. It is page 15. And you have a total—

The Court: This is the schedule entitled "Continental United States Shipments of All Types of Glass and Other Containers West of the Rockies." Is that the one you are referring to?

Mr. McManus: That is the one we are referring to, your Honor.

Q. Now, looking under the totals for glass container shipments west of the Rockies, you have the figure in thousands of units, 2,109,165—which is really two billion units. Is Gallo Wine included in that figure?

A. No, sir, because this is in 1955, and they weren't in existence then.

Q. Mr. Finn, do you know if the Continental Can Company is a member of the Can Manufacturers Institute?

A. Yes, I do.

Q. And are they?

A. I have been informed they are.

Q. Going now to Government's Exhibit 803, which is

folder C, and turning to page 5, which is 4 C, chart 4 C—or, excuse me, table 4 C, and going down to the note in that [fol. 3110] table, Mr. Finn, could you explain that note to me?

A. Briefly, it says that in prior years the vacuum closures with the lug thread were included in another category.

Q. So that—

The Court: By the Bureau of the Census?

The Witness: Yes, sir.

A. And then in 1958 they separated them out. And, incidentally, my note should read a little differently here. In place of "prior to," it should read "in 1959 top-seal vacuum closures with lug thread are included with vacuum type caps."

Q. Now, going to chart 3 C—

The Court: And before that, they were not?

The Witness: That's right.

Q. Now, going to the preceding page, page 4, of Government's Exhibit 803, which is chart 3 C, do you have the Bureau of Census data from which that note was taken, Mr. Finn, if it was taken—was it taken from the Census data?

A. Yes, this was taken from the Census data.

Q. Do you have that information with you on that now?

The Court: That note is wrong, too, then.

[fol. 3111] The Witness: That note is wrong, too, and it should be changed to read—

Q. Do you have—

The Witness: —to read as follows: "For 1957 and earlier years, a significant quantity of this type of closure was reported as screw thread and by type of caps."

That is the footnote in the Bureau of Census report.

Q. So am I correct in assuming that, starting in 1958, you were able to separate out vacuum closures from non-vacuum type closures?

A. Yes, they were reported differently to the Bureau of Census in that year.

Q. Reported separately from the non-vacuum type?

A. Yes.

Q. Now, Mr. Finn, do you have available the Bureau of Census definition of metal containers?

A. Yes, I do.

Q. Now, on cross examination you attempted to give your definition of what you thought—of how you thought the Bureau of Census defined metal containers.

The Court: Isn't that in Government's Exhibit 1203 for identification, Facts For Industry?

[fol. 3112]. Mr. McManus: Your Honor, I hope it is. I just want to make sure the record is clear on what the definition is. Have you got an exhibit here?

The Court: I have an exhibit, 1203 for identification, which is metal cans in 1958, which gives the coverage and a definition of metal cans. Is that what you are referring to?

Mr. McManus: Yes, your Honor, that is what we are referring to. I wanted to make sure we had the actual definition rather than Mr. Finn's offhand remark on what he recalled it to be.

Mr. Johnson: That is a definition of metal cans.

The Court: Yes.

Mr. Johnson: Not metal containers.

Mr. McManus: Excuse me. I stand corrected. Metal cans.

Your Honor, we are offering that exhibit also, in addition to our other statistical data.

The Court: Now, I notice that this physical exhibit has a certain number of penciled notes on it and some excisions in pencil, which makes it look as if it had been used for [fol. 3113] working purposes—I can imagine it might have been—by Mr. Finn. I take it this is offered without any of the penciled material.

Mr. McManus: That is correct, your Honor. Any penciled alterations, corrections or additions, etc., should be excluded from any offer we are making. It should not be considered by the Court in any way.

The Court: All right. Well, I will take this to illuminate—only for purposes of illuminating this discussion that we have had for the record, only so we can understand what we are talking about, and I will accept it. It may be received in evidence for that purpose.

(Government's Exhibit 1203 for identification received in evidence.)

Mr. McManus: Your Honor, that is all I have of Mr. Finn.

Mr. Johnson: I have a very few questions.

The Court: I trust so.

Recross-examination.

By Mr. Johnson:

Q. Mr. Finn, Mr. McManus asked you about the effect of excluding Hawaiian Pineapples from your tables. Now, if you had composed your tables on a consistent basis and included American Can, the effect would be that Continental Can's percentage would be down somewhat, wouldn't it?

[fol. 3114] A. I mean, if I didn't attempt to eliminate the Hawaiian Islands.

Q. If you had not eliminated American Can from your tables, the American Can Hawaiian production from your tables.

A. It would have decreased Continental Can?

Q. Yes.

A. Yes, that's right.

Q. Mr. Finn, you said that you checked the Hazel-Atlas reports. Did I understand you to say that you checked the reports to the GCMF against the Census reports? Is that what you said?

A. Yes, sir.

Q. But you could not tell from that, could you, how Hazel-Atlas had treated any particular item?

A. No, sir. No, sir.

Q. You could not tell whether Hazel-Atlas had treated shampoo bottles, for example—

A. No, sir.

Q. —as medicine or toiletries and cosmetics, could you?

A. No, I couldn't.

The Court: It is in the Census data or in the Glass Container Manufacturers Institute figures?

The Witness: That's correct.

Q. And that is true with respect to any end use that I might mention?

A. That is true.

Q. Now, you made a correction in your notes on 3 C and

4 C, but you did not mean to imply, did you; that vacuum caps were treated as screw type caps before 1958? Did you?

A. Excuse me just a minute, I will—

Q. Certainly.

A. The problem was that 1956 to '57 the twist-off-lid cap was included in the screw thread and lug type. Twist-off is generally now referred to as a vacuum cap, and it is over in the vacuum—in 1958, the Bureau of Census put it into the vacuum category.

Q. But they were vacuum caps in either year, were they not?

A. Yes, that's right.

(Discussion off the record.)

Mr. Johnson: I have no further questions of this witness, and I will have no further questions resulting from the amendments that were made this morning.

[fol. 3116] The Court: Very good. All right. You may step down, Mr. Finn.

(Witness excused.)

The Court: Now, as a matter of procedure, I think before I rule on the charts—on these tables—it would be as well to have the cross examination on the charts completed, and then I can rule on the whole mass of material in appropriate fashion at that time.

Do you want to commence the cross examination now, Mr. Johnson?

Mr. Johnson: Whatever your convenience is, I am ready.

The Court: All right. Let's start on it, anyway.

Mr. McManus: Mr. Tolton, will you take the stand.

JULIUS H. TOLTON resumed.

Mr. McManus: Your Honor, I am not trying to limit Mr. Johnson, but, if possible, could we have any indication, if he knows, how long the cross examination might be?

The Court: Well, let's see if he can answer that question.

[fol. 3117] Mr. Johnson: I am afraid I can't at this moment.

The Court: I am afraid the last prognostication on this subject was not outstanding for its accuracy.

I would hope, myself, that he would finish with Mr. Tolton this afternoon.

Mr. Johnson: Some of these tables or charts are very detailed, and it is necessary to go into some of these deeply.

The Court: I am expressing a hope. I am not giving you a direction.

Mr. McManus: Your Honor, the only reason I am asking is that, as we informed you the other day, we have this gentleman coming in from out of town, and, if he was here and there was no objection, and if it was going to go on through Friday, we would like to interrupt and put him on the stand.

The Court: If your man from out of town arrives on Friday morning—that is, tomorrow morning—we will interrupt this cross examination and put him on.

All right, sir. You remember, you are under oath.
[fol. 3118] The Witness: Yes, sir.

Cross-examination.

By Mr. Johnson:

Q. Would you turn first, Mr. Finn, to your heading IV—

The Court: This isn't Mr. Finn any more.

Mr. Johnson: I am sorry. Mr. Tolton. I am sorry.

The Witness: I am ready, Mr. Johnson.

Q. The table is entitled "Historical Growth of Metal and Glass Container Shipments Expressed as Index Numbers and Shown as a Trend."

Will you tell me how you prepared that table?

A: Well, Mr. Johnson, we took the source data that we had available as listed on the following page of the—on page—the data—

The Court: Before you go to that, Mr. Tolton, explain this to me, will you please. I have got this marked as page 68—

The Witness: Yes, your Honor.

The Court:—which is the chart marked IV, and is that a

portrayal on page 68 of the material, of the figures, on page 69?

The Witness: Yes, your Honor.

The Court: That is a translation of the figures in chart [fol. 3119] form on 69 onto 68.

The Witness: Yes, your Honor.

Q. All right. Where did the figures come from?

A. Well, the basic data are expressed in the source material at the foot of the page. In the statistics pertaining to the glass, it came from the Glass Container Manufacturers Institute of 1957, page 47, 1958, and 1958 Bureau of Census figures; series 38-G.

Now, you will find the glass container figures conform to the source because the glass was expressed in gross. The column titled "Glass—U. S. Total" is the gross amount for those given years as it came out from the GCMI document.

Q. I notice that you use the GCMI material for some years, and the Bureau of Census for the last year; is that correct?

A. I think that is accurate, Mr. Johnson.

Q. Why did you use the GCMI some years and the Census in the last year?

A. Well, I don't have the GCMI document right here with me, but my reflection is that I think we used the final year or two from Census because the document did not show those two years. That is my thought right at the moment, but I— [fol. 3120] oh, excuse me. Well, as of that document we did not have the material for, I guess it was, 1958.

But the Census material relates to a larger number of glass manufacturing companies than the GCMI, does it not?

A. Just a moment. I have a later document here. I happen to have a 1958, and my impression is at the time the chart was made we must not have had this one available, but in reading over, I find that they conform exactly here.

For '57 and '58, if I may read in the gross amounts, in domestic we have here, 1957 reads 139,952 on the table accompanying the chart. The GCMI document, Glass Container Manufacturers Institute put out, page 46 has also 139,952. And for 1958, the figure in the chart, or the table accompanying the chart, shows 139,848, and the GCMI document shows 139,848, showing they are identical in that respect.

Q. Do you know if these index numbers are based on domestic or on total shipments?

A. They are based on the domestic total shipments, that's right.

Q. Both of them?

[fol. 3121] A. For both tables, you mean?

Q. No. For both glass and metal containers.

A. I could not be exactly sure with respect to the cans because we depended on the Can Manufacturers Institute for the figures in those early years, and I have seen nothing that says "exclusively domestic" on it. That is all I can say about it at the present.

The Court: Are you saying, Mr. Tolton, that with respect to the can figures, this is estimated No. 2 cans?

The Witness: Yes, that's right, your Honor.

The Court: And that is taken from the Can Manufacturers Institute material, at least for the earlier years, through 1957?

The Witness: That's right, your Honor.

The Court: Now, are you telling us that in some years this might have been just domestic production and it in some years might have been overall production? Or do some years include only domestic shipments and other years include foreign shipments, export shipments?

The Witness: Well, your Honor, I would not be certain about that in the earlier years at this time. All I can say is that from looking at Census material, the export is very [fol. 3122] small in relationship to the total. I was trying to think—well, I would hesitate to say exactly, but it was very small in relationship to the total, the export.

By Mr. Johnson:

Q. Why did you select 1939 as your beginning year?

A. Well, Mr. Johnson, there was a—in the cans of our CMI material, Can Manufacturers Institute material, the document that we—the oldest document we were able to get showed 1929, then 10 years later, 1939, and then came forward year to year, so we used 1939 as a starting point for a continuous number of years.

Q. Now, if you had used any other, say, for example,

1946, the result would have been entirely different, would it not?

A. It certainly could have been different, yes.

Q. Well, it would have been different, wouldn't it?

A. Yes, it would have been different.

Q. So the result you get from this table depends entirely on the start of it, does it not?

A. Overall, yes.

[fol. 3123] By the Court:

Q. Well, I don't pretend to be expert on tables, but suppose we drew a line between the figure 180 on the chart to a horizontal line from one 180 to the other 180—

A. Yes, your Honor.

Q. —and also drew a vertical line beginning with the year 1946. Now, if that were done, would that give, the way this chart is set up, a fair picture of the figures?

A. Of the post-war—

Q. Of the post-1946 figures.

A. No, they would vary then, because you would have then the figures of cans and metal. There is a zero point which the growth pattern would show.

Q. What I am getting at is that if I should black out on this chart everything that was not within the angle of the two lines that I spoke of, would that segment be an accurate charting of the trend, in your opinion?

A. Well, your Honor—

Q. Let me just show it to you—

A. I think I understand your Honor.

Q. Here. Draw a line, 180, and we draw another line [fol. 3124] roughly, 1946; say that is 1946. Would that be an accurate chart?

A. No, it would not.

Q. It would not?

A. It would differ, because you would have as a starting point—you see, the starting point we have in glass and cans is 100. We set 100. So that would move both in the relationship of 100 as an index number, and then they would work out from there.

Q. Would the spread be the same or different?

A. It probably would be different.

The Court: I see. That is what I wanted to get at.

By Mr. Johnson:

Q. As a matter of fact, Mr. Tolton, the trend lines might even cross and come out the other way, might they not.

A. I haven't gone through it, but it is possible, yes.

Q. Now, I notice that in these tables, you have used the total No. 2 cans, and using that magic phrase "which might have been produced from the amount of steel consumed."

A. Yes.

[fol. 3125] Q. Why did you use No. 2 cans?

A. Well, Mr. Johnson, the CMI material on which we based the early years that were drawn have information only in those early years on the No. 2 cans which might have been produced, so in order to be consistent we went all the way through on the No. 2 cans, the use of the No. 2.

Q. And if you had used the other type of computation that Can Manufacturers Institute made—

The Court: That is, the so-called actual number,

Q. —the so-called actual number which might have been produced—

A. Yes.

Q. —you would get an entirely different result, would you not?

A. Yes. I think generally the actual cans run higher in numbers than do the No. 2 cans because of the variety of types and sizes there are.

[fol. 3126] The Court: Well, if you started with a base, the spread would be the same as this, in terms, would it not?

The Witness: I think that's right, your Honor.

By Mr. Johnson:

Q. Is that right, Mr. Tolton?

A. I think it would be substantially the same. I couldn't state precisely. I mean, I would have to go against it in each instance.

Q. You mean, if you started from a 1946 base?

A. Oh, I beg your pardon.

The Court: No, no, I didn't say that.

Mr. Johnson: Oh, I'm sorry.

The Court: I said, if you had used the actual cans which

might have been produced instead of the No. 2 cans which might have been produced, starting with a given difference, the resultant spread from that point forward would be approximately the same.

The Witness: I think that's right, your Honor.

Q. There is really no reason to believe that it would be approximately the same, is there?

A. Well, as I say, if you started in 1940, and we have in metal 119,444, as it stands here, and then—I mean 1939, [fol. 3127] excuse me—I would think that in the actual cans you would have a few more, I mean, but then that would be your base of 100, so that would continue all the way through. I mean, the only thing I could think of, over the years you might have some variance in the amount of actual cans used, I mean, as to the volume in a given field.

The Court: Unless the spread in the actual cans and No. 2 cans was precisely the same in every year?

The Witness: Yes.

The Court: That is, the relationship of the two figures was precisely the same.

The Witness: That's right.

The Court: That would of course be a variation.

The Witness: There would be a variation; that's right.

Q. To the extent that there were more small cans in later years, the variation would be greater, would it not?

A. If that is true, that is right.

The Court: All right, Mr. Johnson, we will not take a recess until five minutes after 2.

(Luncheon recess to 2:05 P.M.)

[fol. 3128]

AFTERNOON SESSION

2:05 p.m.

Mr. Greenberg: Your Honor, before we proceed, with the Court's permission, I would like to take up just one matter with you.

Tomorrow morning, as we all know, Mr. Hughes will testify with respect to the plastic tables which have been marked

for identification. I have been informed by the Plax Corporation, who submitted plastic container statistics to us, which have been encompassed in the tables, that they wish counsel to be present.

However, I am cognizant of the fact that we have problems with confidentiality with respect to other plastic container company statistics, and I wonder if we may permit counsel for Plax to be present under the same sanctions that applied to Mr. Austern.

The Court: I think that when counsel for Plax arrives, we will then see what can be worked out and how far he is willing to go and how far anybody else is willing to go as far as entering into a similar arrangement that we have with counsel for American Can is concerned.

Mr. Greenberg: I think that's right.
[fol. 3129] The Court: All right.

JULIUS H. TOLTON resumed.

Cross-examination continued.

By Mr. Johnson:

Q. Mr. Tolton, we were working on this historical growth chart, and I think you had agreed with me that, if you used a different base, you could and would get different results, and I think I asked you whether the can line on this table wouldn't be entirely different if cans other than No. 2 cans had been used. Is that right?

A. It would be different, yes.

Mr. Johnson: Would you mark for identification this document, which is a Department of Agriculture bulletin entitled "The Vegetable Situation."

(Defendants' Exhibit Y marked for identification.)

Q. Defendant's Exhibit Y for identification, a Department of Agriculture bulletin, on page 24, contains this statement:

"In recent years there has been for most vegetables a very notable shift in canning, away from the once

popular No. 2 can toward the smaller No. 303 and the No. 304 sizes."

[fol. 3130] Now, to the extent——

The Court: What is the date of that publication.

Mr. Johnson: I am sorry. That is 1956—February, 1956.

Q. Now, to the extent that that——

Mr. Johnson: I withdraw that.

Q. Fruit and vegetables is the largest single canned food; is that correct?

A. That's right.

Q. To the extent that this statement is true, the number of cans referred to in your trend line would be unstated, wouldn't it?

A. Yes, that's right. That's right.

[fol. 3131] Q. Now, will you turn to the next following table and would you tell me briefly what this table is?

A. Well, with the use of the source material that is explained on page 71, or the chart on page 70, we endeavored to show the growth of metal and glass containers, expressed as these index numbers, for the period of year 1940 through 1958.

Q. And it is the same type of table as the preceding one.

A. It is, yes.

Q. It relates, you say, to food?

A. Yes, that's right.

Q. On the table following the chart, in your notes you indicate the categories that you have included with metal containers; do you see that at the bottom of the page?

A. Yes, I do.

Q. And in that listing you have included soft drinks as a food, have you not?

A. I have, yes.

Q. Were soft drinks included in the glass categories of food, also?

A. No, they were not.

Q. So you include soft drinks as a food for one purpose, [fol. 3132] but not for another; is that correct?

A. Yes, I had to.

Q. Soft drink cans you regard as a food; soft drink in bottles, not as a food?

A. Yes.

By the Court:

Q. Why did you do that?

A. Your Honor, in the early years soft drinks was included in the food line. That is the reason we did that. So to be consistent—

Q. Well, if it is included in the food line, why wasn't it included in the glass food?

A. It could have in that respect, your Honor, that's right. But I was hoping to stay as close entirely to the food field as I could, and the soft drinks line, apparently it hasn't been too heavy over the years in the metal can field. It has just come in in recent years.

Q. Well, was there any problem in eliminating under metal soft drinks?

A. Well, your Honor, the statistics included soft drinks for the early years.

Q. But you knew of no way to pull out the soft drinks?
[fol. 3133] A. I did not, in earlier years.

Q. Well, in earlier years, certainly in 1940, as I recall it, for all practical purposes the number of soft drinks in cans was minimal, if there were any; is that right?

A. That's right.

Q. When, when in the course of this yearly analysis were there first given separate figures for soft drinks in cans?

A. I can check on that. I think it was 1954, if I am not mistaken. Yes, it was 1954, 1954.

Q. One question here, so I make sure I understand your chart. Do these charts make any actual attempt to show the relative proportion of the food that is in cans and in glass? I mean, can you tell that, or is there any attempt in these charts to depict that?

A. Well, as of a date, I mean, which would be 1940 or 1939, establishing that as a date, then you would say relatively in a sense, "This has happened in cans; this has happened in glass," would be my interpretation.

Q. All right, you start off with 1940, and there were 17, as I understand it, 17 billion glass containers produced; isn't that right?

[fol. 3134] A. Well, that is in thousands of gross, your Honor.

Q. Thousands of gross?

A. That's right. It was shown that way in GCMI figures, so we retained that.

Q. All right, you have got thousands of gross there.

A. That's right. It would be 17,968,000 gross.

Q. Gross.

A. That's right.

Q. And what about the 102,083?

A. That is 102,000,000,083—102,000,000,083 gross.

Q. Oh, that is in gross, too?

A. That's right. We tried to make them comparable in that respect.

Q. I see. So then in terms of actual numbers, the number of cans used in the food industry at that point was considerably over five times the number of glass items?

A. That's right; starting from that base, that's right.

Q. But both of them are started with the same base of a [fol. 3135] hundred.

A. Yes.

Q. So that in essence there is no attempt here to show the proportion of glass in cans used in food?

A. Yes, in actuality, that's right.

The Court: All right, go ahead, Mr. Johnson. I am sorry to interrupt.

By Mr. Johnson:

Q. The food referred to here in this table is not limited to foods that are heat sterilized and hermetically sealed, are they?

A. That's right. I would say it encompasses more than that.

Q. Are cans for frozen products included in the can shipments?

A. I think not.

Q. You think not?

A. Let me just take a hasty look at it. Well, from the census categories, I do not see anything addressed to the frozen food as such.

Q. So I am to conclude that you can't tell whether cans

for frozen foods are included or excluded from this table; is that right?

A. That would be right.

[fol. 3136] Q. Now I want to refer to the item here at the bottom of the table, following the food chart, called "note." Will you tell me what the meaning of that note is?

A. This has reference to metal cans. We were concerned, to this extent:—

The Court: Where is the note? I don't follow.

The Witness: Excuse me. It is page 71, your Honor, and in the source material just underneath the table.

The Court: It is the third item in the source material?

The Witness: That's right: in the notes.

A. (Continuing) Mr. Johnson, we were addressing ourselves, because this thing was estimated No. 2 cans that we used as a basis, well—how—well, you might say accurate—that it might be—if we then referred back and related it on the basis of a tonnage basis, to see—taking 1940 year tonnage in metal cans before it was used for the factor to develop units, we then used the tonnage basis of, say, 1940 as the base, and went up year to year on a tonnage basis to see how it test checked against the index numbers, we [fol. 3137] developed on the basis of the units as cans and we found out that it was right within a very close range.

Q. These figures were developed from tonnage figures in the first place, weren't they?

A. They were, that's right.

Q. Wouldn't they necessarily be the same? How can there be any variation?

A. Let's see. Just a moment. Well—oh, I see—let's wait a minute: There is this aspect of it. They were in the use of the No. 2 cans, which was developed from the tonnages, we had to establish a factor from the CMI data, the number of units per ton, we developed a factor, which was 8,740 cans per ton, and we utilized that throughout, we utilized that throughout, in order to develop our No. 2 cans in the food field. So having set that up as a standard all the way through, we wanted to then see how that worked out in relationship when we used no units, but used the tonnage basis standing alone.

[fol. 3138] Q. Well, maybe I am missing something here.

A. All right.

Q. Do I understand from what you say now that you used yet a different conversion factor than Mr. Finn?

A. Yes. That's right, for the food field we did, that's right, because, you see, he addressed himself to actual cans. We were addressing ourselves to No. 2, estimated for this chart, for the reason that I explained previously, and so, in the food field, we could not go back in the earlier years and relate it to a unit total. So we had to, in that sense, develop a figure which turned out to be 8440 units, and we cast that for all the years per ton and used that in order to develop the unit totals.

Q. Well, without going through the laborious process of how you did it, is it correct, then, that you developed a conversion figure for use here which was not only different from Mr. Finn's figure, but also a conversion factor which Can Manufacturers Institute never used?

A. Well, I don't know how the can manufacturers develop their figures, but I have not seen this factor in any Can Manufacturers Institute book, if that is what you mean.

[fol. 3139] Q. What I am trying to get at is that this is a conversion factor which you created; is that right?

A. From CMI material.

Q. But it is not a conversion factor that they used; is that right?

A. Well, I don't know—I am not—I am sorry, I don't quite understand the distinction. That is what I am getting at. I am not trying to withhold or anything else like that. I just don't quite understand the question that you have asked.

Q. You did not find this conversion factor stated in any CMI literature; is that right?

A. That's right.

Q. And you computed by doing whatever you did—

A. That's right. From the CMI material, they had No. 2 cans, shipments—or, I mean, No. 2 cans which could be—I have forgotten just the exact terminology there. No. 2 cans. Then they had their tonnage that was used to make, so the division in that sense came from the CMI material, although it never was in existence as a figure in any of the CMI documents. That is all.

The Court: I thought in one table, the CMI documents did [fol. 3140] have the number of No. 2 cans which might have been produced. Was that just overall and not in terms of food?

The Witness: That broke down, your Honor, for a number of years back, but then in the early years they did not carry it in that way all the way back.

Q. And the CMI computations were not based on the food category as you defined it here; is that correct?

A. That's right, that's right.

Q. Mr. Tolton, I would like to go back to the beginning of your chart.

A. All right.

Q. And on the very first table—

A. Is this page 1 or page 4? I am sorry.

Q. It is page 4 according to the numbering system that I have got.

A. All right. Thank you.

Q. There you refer to the leading four companies.

A. Yes.

Q. What was your basis for selection of what you called the leading four companies?

A. It was from the GCMI material that has been furnished—explained previously.

Q. That is, number of containers manufactured or shipped?

A. That's right. Shipments of the number of containers.

Q. How did you determine that Knox Glass Company was No. 4?

A. Well, the unit totals in going down, Owens-Illinois, Anchor-Hocking, etc., in an overall category it fell into the fourth position.

Q. And in your case, as in Mr. Finn's case, you ignored Wheaton Glass and Armstrong Cork?

A. Yes. Those were two which apparently did not report to GCMI.

Q. You ignored any company that did not report to GCMI?

A. That's right.

Q. Why did you select four companies?

A. Well, it seemed to be reflective, probably, of a—I don't

say—somewhat of a breaking point between them and probably others that fell below it.

Q. And that is the only reason that you can give for selecting four instead of two or seven or nine?

A. Well, in reading generally industry literature—I [fol. 3142] mean, literature in industries—they develop threes and fours, and that sort of thing, categories. I don't know that that had any basis, but I have seen much of it, and it seemed to suggest itself as being kind of generally a breaking point from there on to those lower down.

Now, that isn't the whole, absolute truth. There is some fog about it historically.

Q. Sort of a pick-and-choose proposition?

A. Well, it could be.

Q. So on this top column, this big black column—black in my book, anyway—

A. Yes.

Q. —that shows the leading four, 60 per cent. That could just as well be leading five and some other per cent; is that right?

A. Yes, it could be possible, that's right.

Q. Now, looking at that top column, will you tell me how much of that top percentage is accounted for by Owens-Illinois Glass Company?

A. How much of the percentage? Just—well, am I supposed—

The Witness: Am I supposed to address myself to that, your Honor, as individual companies? That is the only [fol. 3143] question in my mind.

The Court: I don't hear any objection.

Mr. McManus: Your Honor, I think the only thing he is asking—I will assure him there is no problem on confidentiality.

The Witness: That's right.

The Court: If there is such a problem, I am counting on someone calling it to my attention here. I would not necessarily recognize it myself.

Mr. McManus: Your ruling is that any parties other than the defendant and the plaintiff here—your ruling is that this is not to be revealed outside the courtroom.

The Court: That's right.

By Mr. Johnson:

Q. May I suggest, Mr. Tolton, I am going to ask this question quite a number of times. Do you have working papers from which you can give us these figures?

A. Just a moment. I will have to look a little further. Perhaps I can—

The Court: What I would like to do at this point, so you won't be faced with this, Mr. Johnson, try to indicate to Mr. McManus what sort of material the witness should have and [fol. 3144] he can have it there. We will take a brief recess, so we won't have what may be a recurrent problem.

(Short recess.)

By Mr. Johnson:

Q. Now, Mr. Tolton, could you give me the figure attributable to Owens-Illinois in that top bar?

A. This is total domestic that you are speaking of?

Q. Yes, sir.

A. And this is the year 1955?

Q. The year that your chart has.

A. That is right. It is 34.4 per cent.

Q. Can you give me Anchor-Hocking?

A. It is 11.8 per cent.

Q. Hazel-Atlas?

A. 8.8 per cent.

Q. Knox Glass?

A. 4.6 per cent.

Q. Now, why did you add those together, Mr. Tolton?

A. Well, it lends itself to show the large companies and their proportions of the industry, as so stated in this chart.

[fol. 3145] By the Court:

Q. What did you say Hazel-Atlas was?

A. 8.8 per cent.

Q. Now, am I failing to follow something here? Why is Hazel-Atlas included in the leading four? 8.8 per cent. You have down here 9.6 per cent—you see it below down there. It is 8.8 and 9.6 above—

A. I beg your pardon. I was reading in the wrong column. I will have to retract. Fortunately or unfortunately, I was reading in the 1956 column instead of the 1955.

Q. All right, let's get the 1955 column.

A. The '55 column is 34.2 per cent for Owens-Illinois; 11.6 per cent for Anchor-Hocking; 9.6 per cent for Hazel-Atlas; and 4.5 per cent for Knox.

The Court: All right.

The Witness: I thank you for calling my attention—

By Mr. Johnson:

Q. Your graphic method of presenting this data would completely obscure the fact, would it not, that Owens-Illinois was more than three times as large as the next—or about three times as large as the next largest glass container manufacturing company?

A. Yes, because it addresses itself to all four, rather than to one.

Q. And you were satisfied to obscure that fact?

Mr. McManus: I will object to that.

The Court: I will sustain the objection.

Q. What do you mean by glass containers, Mr. Tolton?

A. Well, I meant what its meaning is addressed to in the sense of categories of glass containers in the GCMI materials.

Q. And you did not look any farther than that?

A. Well, I certainly looked in the publications that are read somewhat generally in the industry. But, as purported in the charts—reported in the charts, used these two means to develop the charts.

Q. And whatever they called a glass container, you called a glass container; is that right?

A. That is right.

Q. Did you include home canning containers in Hazel-Atlas shipments?

A. I did.

Q. Did you include packers' tumblers in Hazel-Atlas shipments?

[fol. 3147] A. I did.

Q. Would you look at the next table headed "Total Narrow-Neck" and would you give me the same kind of breakdown you gave me for the first bar of the other chart?

A. This is total narrow-neck in the year 1955. For Owens-

Illinois, 38.2; for Anchor-Hocking, 7.8; Hazel-Atlas, 5.8 per cent; and Knox Glass, 4.6 per cent.

Q. Can you give me the largest percentage of any company that is included in the next bar, the "All Others"?

A. The next one down is Brockway, which has 4.2 per cent.

Q. What is a narrow-neck glass container?

A. Well, it certainly is addressed to that way in the Census categories and in the GCMI categories, and I followed whatever they conformed to as meaning a narrow-neck-glass container.

Q. Does it include green olive jars?

A. Green olive jars?

Q. Yes.

A. I presume, if they had a narrow neck, it would.

[fol. 3148] Q. You don't know?

A. No, I don't.

Q. Did it include milk bottles?

A. Well, we have a dairy products item. Let me just take a look and see whether that is a narrow neck or wide mouth.

Well, dairy products, which would include, I presume, milk bottles, would be in the wide-mouth area.

[fol. 3149] Q. All right, sir, would you turn to the next table and give me the same breakdown for the top bar?

A. This is food containers, narrow neck for the year 1955. Owens-Illinois, 43.3 per cent—well, the next one I have listed is Anchor-Hocking, 5.6 per cent; Hazel-Atlas is 7.8 per cent.

The Court: 7 and—

The Witness: 7 and eight-tenths. Your Honor, this has "7" here. It is a matter of rounding that did it, is all I can say.

The Court: I see, all right.

A. (Continuing) Hazel-Atlas is 7.8, according to this, and Knox Glass is 5.8 per cent.

Q. Will you give me the largest in the "all others"?

A. Thatcher has 5.6 per cent.

The Court: So that Thatcher has the same percentage here as Anchor-Hocking.

The Witness: That's right, your Honor. We endeavored

to—these four—to be consistent with them throughout, in the sense that they were the first four in their overall, and I think they are the first four in narrow-neck field, and so [fol. 3150] we held to that consistently throughout.

The Court: Yes, I understand.

Q. So it doesn't necessarily mean that they are the first four, even as you have divided in each of these categories?

A. In every category, no, it doesn't mean that.

Q. Now this table headed "food," does that refer to all types of food?

A. Well, certainly all the food that is commercially processed, and home canning—I think those are generally—would be the major categories that would be in there.

Q. It is not limited to heat sterilized and hermetically sealed food products?

A. Not exclusively, no.

Q. It is not limited to that at all?

A. I say no then in answer to your question.

Q. Did you ever try to get any statistics relating to narrow-neck glass containers, relating to or used in canning, as that term has been defined here before?

A. Well, I have looked into it, yes, Mr. Johnson.

Q. What did you do to try to get such figures?

[fol. 3151] A. Well, I think—let's see—well, I mean, the Census Bureau in its census of manufacturers puts out some statistics that would relate to the food packing field, of which they have in some years put out some items in glass and in cans. I don't know whether that exactly answers your question.

Q. Well, at any rate, you were not successful in getting any such statistics; is that right?

A. No, I wasn't successful.

Q. Now, would this table include containers for cider?

A. I could not answer offhand whether it does or not, whether that would be in a juice line or that would be a part—which would go to encompass the food field. I couldn't tell that.

Q. Would it include maraschino cherry jars?

A. I could not answer offhand.

Q. Salad oil bottles?

A. Well, I would have to hold to whatever the GCM and

the Census Bureau has put into these categories. That is the means by which I operated.

Q. Well, would you have put tomato juice bottles here or under soft drinks?

A. Well, let's see—

[fol. 3152] Mr. McManus: Your Honor, I am going to object to that, in that he is asking him the same question.

The Court: I would be inclined to agree with you. He said he relied on the GCMI categories and doesn't remember the specific details of items going in one category or the other.

Q. Would you turn to the next table, please? This is headed medicinal and health supplies, narrow neck.

A. Yes, sir.

Q. Would you give me the breakdown for the first bar?

A. This is medicinal, health supplies for the year 1955. Owens-Illinois, 45.2 per cent; Anchor-Hocking, 2.2 per cent; Hazel-Atlas, 6.5 per cent; Knox Glass, 2.3 per cent.

Q. And the largest percentage in the "all others"?

A. Is Brockway, at 6.4 per cent.

Q. Can you define the term "medicinal health supplies"?

A. No, I couldn't without the aid of the Census Bureau.

Q. Would you answer me in the same way with respect to this table as you did in the preceding one, if I ask whether [fol. 3153] end products were included in this table or not included?

A. I would answer—

Q. In short, you don't know? Is that correct?

The Court: I think, in short, he relied on the GCMI categories and doesn't go beyond that.

Q. Would you turn now to the next table, and would you give me the same type of breakdown of the first bar, as to the percentages of the four companies named?

A. For the year 1955, chemical, household and industrial in the narrow neck field, Owens-Illinois, 37.2; Anchor-Hocking, 2.9; Hazel-Atlas, 10.9 and Knox Glass, 10.4

Q. The largest of the "all others"?

A. It seems to be Pierce Glass Company at 5.6.

Q. And again, so that I don't have to repeat the question each time, in so far as the specific end products are con-

cerned in each of these tables, if I were to ask you about various end products, you would give me the same answer, that is, that you relied on the figures as you got them; is that correct?

A. I would; that is right.

[fol. 3154] Q. All right, sir, would you turn to the next table, toiletries and cosmetics, and do the same thing for me?

A. Toiletries and cosmetics in narrow neck field, 1955: Owens-Illinois 18.1 per cent; Anchor-Hocking, 24 and no tenths per cent; Hazel-Atlas, 9.4 per cent; Knox Glass, 1.9 per cent.

Q. And the largest in the "all others"?

A. It is Foster-Forbes Glass Company, 4.0.

Q. All right, sir. Would you turn to the next table and do the same for me?

A. This is beverages returnable, 1955, and the percentages are for Owens-Illinois 44.7; Anchor-Hocking, 4.7; Hazel-Atlas, zero; Knox Glass 3.7.

Q. Largest of the "all others"?

A. It appears to be Laurens Glass Works, L-a-w-r-e-n-s, 10.5 per cent.

Q. Do you have the sixth company, also—I shouldn't say the sixth—the next largest in the "all others"?

A. It seems to be the Chattanooga Glass Company, at 9.9 per cent.

Q. Will you turn to the next table and do the same thing?

[fol. 3155] A. This is beverages non-returnable, 1955. The percentages are Owens-Illinois 70.8 per cent; Anchor-Hocking, 9.6 per cent; Hazel-Atlas 0.3 per cent; Knox Glass, .8 per cent.

Q. Largest of the "all others"?

A. Seems to be Foster Forbes at 3.8 per cent.

Q. All right, sir, will you do the same for the next table, the next chart?

A. Yes, all right. This is beer returnable for 1955. The first company here is Owens-Illinois, 36.1; Anchor-Hocking, 7.9; Hazel-Atlas, 0.2 per cent; Knox Glass, 2.3 per cent.

Q. And the largest of the "all others"?

A. Is Thatcher Glass Company at 12.2 per cent.

Q. Give me the next one in the "all others", the next largest?

A. Northwestern Glass Company at 6.5 per cent.

Q. Turn to the next table and do the same, sir?

A. This is beer, non-returnable, for the year 1955, with these percentages: Owens-Illinois, 34.8 per cent; Anchor-Hocking, 15.2 per cent; Hazel-Atlas, 1.0 per cent and Knox Glass, 3.2 per cent.

Q. The largest of the "all others"?

A. Obear-Nester, O-b-e-a-r N-e-s-t-e-r Glass Company.

[fol. 3156] Q. What percentage?

A. Oh, I beg your pardon. 9.6 per cent.

Q. And the second largest of the "all others"?

A. Thatcher Glass Company; at 9.1 per cent.

Q. Will you do the same with the next table?

The Court: Now, are you going to ask him to do this for all of them?

Mr. Johnson: Yes, sir.

The Court: All right.

Mr. McManus: Your Honor—

The Court: Isn't there some way this could be done without my sitting here and listening to a repetition of these?

Mr. McManus: If there is no objection, your Honor, we would be glad to have Mr. Tolton sit down and put it on our documents right along, as I have been doing, alongside of the companies, Owens-Illinois, whatever the percentage is.

The Court: It seems to me that would save a very considerable amount of time here.

Mr. Johnson: It's quite all right with me.

Mr. McManus: With the understanding that these questions have been asked and this was the answer that Mr. [fol. 3157] Tolton would give.

The Court: All right, I am going to instruct Mr. Tolton to put down on all the remaining charts, presumably in section 1 of the charts—

Mr. Johnson: And in the following section, section 2.

The Court: The following section 2 is American Can, Continental Can, National Can.

Yes, sir.

Mr. Pedersen: If the Court please, have we put in our figures by Census categories total?

The Court: Yes.

Mr. Pedersen: That was done?

The Court: Wait a minute. Yes, as to American Can and National Can, they are in by census categories, aren't they?

Mr. McManus: Mr. Austern indicated he had no objection as long as it was done on an aggregate basis. By that I mean total of all fruits and vegetables for 1955, and put the percentage down.

The Court: They are not actually in evidence, but they have been referred to in the charts that have been under discussion.

Mr. Pedersen: I had under that section 2 aggregated [fol. 3158] National and American Can, but figures are now in that separate those two companies.

Mr. McManus: Your Honor, as I recall, he did not agree to that. I think I would have to—he said he had no objection—I would have to look back at the record—where inadvertently it had been done, because National was not making cans of that type, which would show American Can's percentage, but I would have to look at the record to see if he did or did not object to this sort of thing.

The Court: I think you ought to find that out. My recollection is that he said it did not present a problem, but I am not positive of that, Mr. Pedersen, frankly, and I think you ought to refer back to the record with Mr. Pedersen.

Mr. McManus: Yes, your Honor.

The Court: (Continuing) While that is done, before that is done, so that we can straighten that out.

Mr. McManus: All right, sir.

The Court: Now, will it be advisable, in view of your future cross-examination, Mr. Johnson, to do that now?

Mr. Johnson: Well, for this purpose I don't need any [fol. 3159] thing except to get those percentages broken up.

The Court: I mean, I am trying to do this as we go along, on the theory that that will aid the progress of the cross-examination, if we have these done at the time, and presumably you intend to go on from there to something else; am I correct?

Mr. Johnson: That is right; and what I propose to do on the offer of these tables, these charts, is to object to any lumping of my client with any other people with whom it has no connection. What has been done in these charts, in every one of them, has been to take my client and group them, and this witness, I believe I have paraphrased fairly.

what he said, arbitrarily grouped them with others. Now, I don't see why they should be grouped with others.

The Court: Well, all right, that is your own position. I am not so much concerned with that at the moment. I am concerned with the mechanics of what we are doing now. I suggest we do this: that the witness take and as rapidly as possible complete these section 1 charts, with the data that I have directed him to put down. Then you can find and discuss with Mr. Pedersen during that period the portion [fol. 3160] of the record in which Mr. —

Mr. McManus: Austern?

The Court: Yes, which counsel for American Can yesterday referred, yesterday or the day before, referred to this problem of lumping, and see what the record actually says, and see that Mr. Pedersen is informed with respect to that. When that is done, and if you can find that this does not present a problem, then he can go ahead and mark the American Can and National Can stuff. If it does present a problem, then I will hear Mr. Pedersen, and we can make an appropriate ruling. Let's do it that way now, mechanically, as rapidly as we can, so as to get that part of it out of the way.

I will take a brief recess for that purpose.

(Short recess.)

[fol. 3161] Q. Mr. Johnson: Your Honor, I would like to say at this time that I have no interest in any of American's or National's percentage figures for any purpose of cross examination. My objection to these tables is going to be based—to this portion of these tables, is going to be based on two things. One is the adding of my clients in with their competitors.

The Court: Yes.

Mr. Johnson: And, secondly, the obscuring of the fact that American is so much larger than Continental or, in the case of glass, that the others are so much larger. So that as far as I am concerned, if the government and American want to and can work out any arrangement by which these percentage figures can be furnished to your Honor and not to me, and ultimately, if necessary, that somehow they get into the record, I have no objection to that.

The Court: What do you say to that, Mr. Pedersen? Certainly you have no objection to my seeing them.

Mr. Pedersen: No, sir. I have no objection to your seeing them, and I don't think Mr. Greenberg has either, but I can't speak for him.

Mr. Greenberg: Your Honor, when we discussed this prob- [fol. 3162] lem, we merely hypothesized as to what might happen on appeal, and we felt that those figures could be sealed and the characterization of one larger than the other covered in those terms.

The Court: Well, I think what I might do in order to complete the record is to let the figures, sealed, be handed up to me, and then perhaps, with respect to the tables, have a concession that the percentage of American Can in each of these total figures is substantially larger than any other—something of that nature.

Mr. McManus: Your Honor, I don't think we could stipulate to that, because at the present time, although American might be larger in some areas, they might not be in others, and I frankly don't recall what areas those are.

The Court: Well, would there be any objection, Mr. Pedersen, without our disclosing what the actual American figures were, to a statement along those lines applying to each chart?

Mr. Pedersen: None whatever, your Honor.

The Court: As long as there was no disclosure of the actual figures or the precise percentage.

Mr. Pedersen: No objection, your Honor. [fol. 3163] The Court: Once I have the figures myself, I can relate them to the chart and make a statement for the record that I think will be sufficient for the purposes of the defendants without in any way prejudicing American Can.

Mr. Pedersen: That would be fine, your Honor.

The Court: All right. So I assume, gentlemen, that what will occur is that those figures will be worked out by the witness, will be shown to Mr. Pedersen, of course—oh, no, they can't be shown to Mr. Pedersen because then we proceed to disclose National and Continental to Mr. Pedersen. They will be shown to me and I will make some appropriate announcement with respect to it that I don't think will prejudice anyone. That will go in the record, and at the

same time the other figures will be sealed in the unlikely event that they ever become necessary.

By Mr. Johnson:

Q. Mr. Tolton, would you turn to the —

The Court: May I ask you this, on these tabulations, gentlemen. They are all done now in the first group of charts actually on the original exhibit in evidence. Very good.

[fol. 3164] Mr. Johnson: The original exhibit under discussion,

The Court: Yes, you are right. 800 for identification, not yet in evidence.

Q. Would you turn to the chart relating to food, wide-mouth.

The Court: That is page 17.

Mr. Johnson: I have a different numbering system since I am going by the old one.

The Court: Yes, page 55.

Q. Mr. Tolton, why did you include packers' tumblers with wide-mouth food containers?

A. Well, in the category of packers' tumblers were items that, well, such as peanut butter and other items like that, could be incorporated in the food field.

Q. The Census categories that we have been discussing do not include packers' tumblers with food containers, do they?

A. That's right. They carry them separately.

Q. So this is just your idea; is that correct?

A. Well, yes, in the sense that they are in the chart.

Q. And packers' tumblers are used for a great number [fol. 3165] of things, other than food, are they not?

A. I really don't know. I really don't know.

Q. For example, candles for religious use:

A. In packers' tumblers, you mean?

Q. Yes. Is that one of the big uses for them?

A. I am not familiar with it.

Q. You just added them into food without regard to what they were used for; is that right?

A. Yes. In conversation with others, we developed it, and that is it. I might add this, Mr. Johnson; that in the GCMI

tables, it is my understanding that Hazel-Atlas has included them in the food line, which is one reason why we went to the lengths we did.

Q. Do you know that they did?

A. Well, I assume a little—yes, it is true. It will only take a moment to look.

The most I can say here is packers' tumblers is not considered separately in the GCMF figures. I would better hold to that.

Q. Would you turn, Mr. Tolton, to the first table in your category II, headed "Metal Can Shipments." There is a note 1 that says that this total—that is, the total of short tons of metal can shipments—includes firms making cans for their own use.

[fol. 3166] A. Yes, that's right.

Q. Then you have selected three companies as the leading three companies?

A. Yes, that's right.

Q. Do you know whether those are the three leading companies in terms of tons of steel used in making metal cans in the United States?

A. From all that I have read and seen in industry surveys and that sort of thing, these are the leading manufactures who produce for sale.

Q. But not necessarily the leading three companies of the total industry, as you have defined it here; is that correct?

A. Well, if you are incorporating captive plants, I could not be sure.

Q. Well, you say that it includes captive plants, don't you?

A. You are right.

Q. Now, before I leave this section, Mr. Tolton, do you know if the Census Bureau publishes anywhere the end products which are included in these various end product categories?

A. I am not sure I quite understand you, but do you mean—

[fol. 3167] Q. Let me rephrase the question: Do you know if the Census Bureau anywhere publishes lists of the end products which are included in the various categories of either glass containers or metal cans?

A. Well, in the sense that it—like census of manufac-

turers in the canning field, there is an attempt to break it down into cans and glass, into some product items.

The Court: I do not think that is what Mr. Johnson asked you.

You were not asking about cans and glass, were you, Mr. Johnson?

Mr. Johnson: No, sir. I was asking about the end products which are included in the various groupings of glass containers for metal cans.

Q. For example, is there any place that I could go to determine from Census sources whether hair shampoos would be classified as toiletries and cosmetics or as health and medicine items?

A. I am not aware of any definitions that—I mean, that would define it in terms that way, no.

Q. Would you turn to the next section?

A. Three, that is?

Q. Yes. I believe you have a different category grouping [fol. 3168] in these charts than you do in section 2; is that right?

A. That's right. One is in tonnage and this is in units.

Q. There are also different groupings, are there not?

A. Yes, sir.

Q. Why are they different?

A. Well, these conform to our tables. The others conform exclusively, I guess I might say, to the Census categories.

The Court: These are simply, as you put them in, Mr. Tolton, talking about group 4, visual presentations of the material entailed; is that right?

The Witness: In large measure, your Honor. There might be a little divergence here from chart to chart, but I think in large part that is right.

By Mr. Johnson:

Q. Now, these tables are made up by this conversion process which Mr. Finn described to us; is that right?

A. That's right.

Q. And being so constructed, they ignore any difference in product mix in different parts of the United States, do [fol. 3169] they not?

A. Yes, if that is—that's true.

(Defendants' Exhibit Z marked for identification.)

Q. Is Defendants' Exhibit Z for identification the document which you referred to as your source material for the chart on page 29?

A. 39.

Q. 39?

A. 39. That's right.

The Court: What is that?

The Witness: This is Facts for Industry from the Census Bureau metal can survey for 1956, series M-75-D-06.

The Court: In other words, this is the same type of document for 1956 as 1203 is for 1959; is that right?

The Witness: That is right.

By Mr. Johnson:

Q. Now, if you will look at this Defendants' Exhibit Z for identification, you will see that the total shipments for 1956 were 4,700,000 tons. Do you see that?

A. Yes.

[fol. 3170] Q. In the upper left-hand corner?

A. Yes.

Q. And of that total tonnage, you will notice that 1,600,000 was in the fruit and vegetable category; is that right?

A. Right.

Q. So that would be about one-third for the country as a whole, would it not?

A. Roughly speaking, that's right.

Q. Now, if you will look on the next page, table 2 of Defendants' Exhibit Z for identification, you will see that the—

The Court: Have you got a copy of that for me, Mr. Johnson? Without it I can't follow your examination at all.

Mr. Johnson: Your Honor can use this one.

I am sorry, I should have referred to table 3 in my last question instead of 2. That is on the back of the exhibit.

The Court: All right. I have it.

Q. (Continuing) —you will notice there that the total for

fruits and vegetables in the West is 666,000 out of one million one.

A. Yes, I see.

[fol. 3171] Mr. Johnson: Do you follow that? There is a figure given toward the bottom of the page at Figure 3, your Honor, for the West.

The Court: Yes, I have it.

Q. So that indicates that about half of the tonnage in the West was for fruits and vegetables?

A. That's right.

Q. So that your method of treating the product mix as if it were the same all over the United States results in a distortion, does it not?

A. Not for the whole United States. For a region.

Q. Well, in making your table you have assumed that the product mix was the same for the whole United States, did you not?

A. Yes. But East, West, North and South are all added together to make the total product.

Q. The total?

A. The total, yes.

Q. With the result that you have assumed the same product mix throughout the United States?

A. Yes. To that extent, yes.

Q. Well, in this very large category of—

The Court: Now, wait a minute. In giving the total for [fol. 3172] the whole United States, you did not try to break it down into any particular differences in product mix in any given section of the country, did you?

The Witness: Well, we have like a food category, if I understand your Honor, where we have east and west breakdowns. I mean east of the Rockies and west of the Rockies.

The Court: Is that reflected on some of your tables here? Yes, I see it is. Now, I will go on further.

Is your question directed now at the first table, this general table?

Mr. Johnson: No, sir. It is the second one.

The Court: Oh, I see. All right.

By Mr. Johnson:

Q. And all through these east and west tables you have assumed a uniform product mix, have you not?

A. That's right. For this given class of food, beer—I guess I haven't gone that far in the charts, but I mean that sort of a breakdown. That's right.

Q. Would you look, sir, at the table headed "Total Metal Container Shipments, 1955, All Types East of the Rockies." [fol. 3173]. A. Yes.

Q. And following that, there is a table of notes.

A. Yes.

Q. And this gives some conversion factors. Are these new and different conversion factors from those we have been talking about here the last couple of days?

A. These are the same that appear in the tables.

Q. Are these the same conversion factors that appeared in the tables?

A. Yes, I would think that's right, yes.

Q. Can you say that they are or that they are not?

A. Well, let me take just one moment and I will verify that.

This is folder B and deals with the east-west breakdowns. And this is page 4 in folder B and has the breakdown "Food Containers, Beer"—

The Court: Page 4. What table is that?

The Witness: Just page 4. The instructions or notes.

A. Food containers, it has 9,237 in the tables and 9,237 in the chart sources. 10,161 for the beer containers; 10,161 in the chart source.

Soft drinks, 11,167; 11,167 in the soft drinks. [fol. 3174]. And non-foods, 7,681 in the table, and 7,681 in the charts.

Q. So they are the same?

A. Yes, they are the same.

Q. Would you turn now to your category VI.

A. VI?

Q. Would you tell me what this chart is supposed to be, looking at the first chart in the section?

A. From this document that was supplied to us from Continental Can, which was designated "Sales to Key Cus-

tomers and Suppliers for the Years '56 and '57," we looked into it as a series of breakdowns into metal containers. I think it has Hazel-Atlas by name and many other types of containers or packaging—whatever you want to call it—and wherever—and it shows the customer to whom they made sales, and from that, wherever it appeared from the metal—I guess the metal division or the metal container division—I would have to look at it precisely, in the Hazel-Atlas columns. There appeared a column "Customers"—Borden Milk Company, for example. If it appeared in the metal division and the Hazel-Atlas division, we considered that a common customer.

[fol. 3175] Q. Now, your note in this table says, "Source: In answer to government interrogatory."

Now, this document was never given as an answer to an interrogatory, was it?

A. I would have to check with other authority, but my impression is that here is a copy of the document which has had P-3079 written on it.

Q. Do you know the difference, sir, between an answer to an interrogatory and a document produced on motion to produce?

A. I am afraid—well, I have heard of both, but I do not know the technical, legal language.

The Court: Well, is or is not the source of this material VI an answer to an interrogatory?

Mr. Johnson: No, sir, it is not. It was produced on motion to produce.

The Court: And what was produced?

Mr. Johnson: The document referred to.

The Court: What is it?

Mr. Johnson: Would you mark this for identification, please?

(Defendants' Exhibit AA marked for identification.)

[fol. 3176] Mr. Johnson: Your Honor, I am about to go into a rather difficult cross-examination, and perhaps you would want to follow with Defendants' Exhibit AA for identification.

The Court: Now, it is understood, is it, that Exhibit AA for identification is a document supplied by Continental

Can to the government in response to what, a notice to produce?

Mr. Johnson: Yes, sir. It was not in answer to an interrogatory.

The Court: What did the notice to produce ask for, this specific document?

Mr. Johnson: No, sir; it did not. It was, if I may say, one of these typical antitrust motions to produce.

Mr. Johnson: I object to that, your Honor. I object to that slandering of the Antitrust Division.

The Court: All right.

Mr. McManus: I can tell you exactly what it was, if he can't.

The Court: All right, let's not get into this sort of controversy, gentlemen.

Tell me what they ask for.

Mr. Johnson: It was a very broad motion to produce, that [fol. 3177] was worked over here in this court several times, I believe, before your Honor was assigned to this case, as a result of which the defendant produced a very large number of documents, of which this was one.

By Mr. Johnson:

Q. Did anyone ever make any representation—

Mr. Johnson: I withdraw that.

Q. Is Defendants' AA for identification a document to which you referred in your note?

The Court: Without interrupting the flow of this examination, before we get to this somewhat complicated document, I'd like to understand, Mr. Johnson, if you can tell us, or the witness can tell us, just what these tables are supposed to show. I have read the original notes here, but let's take the first customer on page 1, which I will not name, I will not name him unless Mr. Pedersen will absent himself, but there is a figure 2, that is, for 1957, and then there is a figure 1 under "metal" and 1 under "fiber drum corrugated box"; what does that figure 2 mean under "fiber corrugated box" and 1 under "metal"?

Mr. Johnson: Well, without getting into a question which

I am going to have to refer to later, the question of round-
[fol. 3178] ing of figures—

The Court: Yes, well, this says—

Mr. Johnson: —I would indicate that one division sold a thousand dollars of merchandise.

The Court: That would be a thousand dollars of metal and a thousand dollars of fiber drum materials to that customer?

Mr. Johnson: That is right.

The Court: So that we go down here to customer 9, under 1957, there is a figure of 1963, that would mean that for that particular company, customer, during 1957, \$1,963,000 worth of merchandise was sold, and it was all metal cans?

Mr. Johnson: All from the metal division.

The Court: All from the metal division.

Mr. Johnson: Yes, sir.

The Court: All right, that will give me a start anyway.

Mr. Johnson: I think that for a moment, your Honor, the witness needs to see that copy in order to answer my last question.

The Court: All right.

Mr. Johnson: Then we will give it right back to you.

[fol. 3179] Q. My question is, was this Defendants' AA for identification the document which is referred to in your note as the source of this table?

A. It is.

Q. Was any representation ever made to you, Mr. Tolton, that the information in this document was accurate?

A. Well, other than what appears on the second page here, as underscored by the sales department itself in its notes.

Q. Which indicates that there might be a considerable amount of inaccuracy; is that right?

A. Yes. There is a sentence here which says:

"This method of producing a Key Customer Report has the advantage of virtually eliminating manual errors in tabulating, but the data is still only as good as the basic information, which is dependent on accuracy of coding invoices."

Q. And do you know how figures were rounded in this document?

A. No, I'm not familiar with the rounding process, Mr. Johnson.

Q. Now, you will note throughout the document there are a number of figures, figure 1, which stands for a thousand [fol. 3180] dollars?

A. Yes.

Q. Now, do you know what figures were rounded to get that number?

A. I do not, no.

Mr. McManus: I object. There is nothing to indicate in this document to me that any of these figures have been rounded.

The Court: Well, it is quite plain to me that from just an examination of page 1, that you didn't sell precisely a thousand dollars worth, you didn't sell everything without any dollars less than a thousand and any cents.

Mr. McManus: I am not too sure how Continental Can sells, but I will take it.

The Court: Well, if that isn't so, you have got to show me differently.

Q. Did you make any inquiry about the rounding of figures?

A. No.

Mr. Johnson: Oh, I am sorry, I don't believe I had an answer to the last question.

(Record read.)

Q. Did you make any inquiries?
[fol. 3181] A. Not of Continental Can.

Q. Do you know whether sales were omitted entirely if they were less than \$500?

A. I do not know.

Mr. McManus: Your Honor, same objection. I am not sure this document shows that anything has been omitted under \$500.

The Court: Well, all he asked him is whether he knew or not.

Mr. McManus: I am sorry, your Honor.

The Court: Overruled.

Q. Now, if sales under \$500 were omitted from this document, there might be a number of customers which were shown as common customers for one year and not for another, when for a fact there might have been nearly the same amount of sales in both years?

A. It is possible, yes, you know, if that is the breaking point, I mean, as you have suggested.

The Court: Let me ask you, let me ask Mr. McManus, please, what you say, Mr. McManus, the table on page 85 is designed to show?

Mr. McManus: It is designed to show, your Honor, that in 19—approximately at the time of merger, that Continental Can Company and the Hazel-Atlas—the metal division [fol. 3182] sion of Continental and the Hazel-Atlas division had approximately 200 key customers. That is my interpretation of it. It is a little bit under 200. I don't have the exact number here, your Honor, but it is approximately 200, and that in 1957 they had increased that, so that they were up over 200.

The Court: You mean there is no showing here as to how many key customers they both had? For all that appears here, they each might have had 25,000 key customers.

Mr. McManus: From these documents we ascertained that there are approximately 200 key customers, your Honor—excuse me, excuse me. Did I say “key”? If I did, I withdraw it—common customers. I have been using the wrong word.

The Witness: Within the key customer list.

Mr. McManus: Within the key customer list, there were 200 customers that would have been common customers.

The Court: Well, how many customers are there? Is there anyplace that shows it?

The Witness: It explains it in the—

Mr. McManus: In the succeeding—

The Court: I know the explanation is in there, but I am [fol. 3183] talking in the way of charts.

The Witness: You mean total customers? No, there is no chart that shows the total customers.

The Court: Or total key customers?

Mr. McManus: No, your Honor, no, but only in dollar value.

The Court: All right.

By Mr. Johnson:

Q. Now, do you know if there is a single instance shown in this document of a customer who became a customer of both the metal division and the glass division for the first time in 1957, in other words, who became a common customer of these two divisions for the first time?

A. In 1957?

Q. Yes.

A. I would have to go through the document to check it through.

Q. As I understand Mr. McManus, his interest in this chart is to show the increase in the number of common customers; is that a correct statement of what you think this chart is designed to show?

A. Well, it lends itself that way, yes. That is one of the facets of it.

[fol. 3184] Q. But you don't know offhand whether there is one single instance in this book of a customer who became a common customer for the first time in 1957?

A. I could by going through the book, I could tell.

Q. But you can't tell that from your chart?

A. No, I can't tell that from the chart; that's right.

Q. Now, can you tell me if the customers who are included in that column of the chart marked 1956 are the same customers as those included in the bar marked 1957?

A. No, because I couldn't tell whether a new one came in or an old one was lost, or just, you know, or how that works out.

Q. There might be entirely different people?

A. It is possible; highly improbable.

Q. Why do you say it is highly improbable?

A. Because I think you find as you go through that there are many that are common to both years, or a number of them.

Q. Now some of my questions are going to relate to the other tables in this group, also; and if you will look at the value of common customer sales, next table, I want to ask [fol. 3185] you if you made any analysis of the amount

which was sold by the metal division in 1956 to those customers, who accounted for the \$178,000,000 in 1957?

A. You mean in the way of comparing them?

Q. Yes, sir.

A. No, I didn't in that respect.

Q. So that it is not safe to draw the implication from this that the persons who bought the \$178,000,000 in 1957 are the same persons who bought the \$147,000,000 in 1956, is it?

A. Without looking at the document, I couldn't be sure.

Q. And the same thing is true with respect to the glass container customers?

A. That is true.

Q. Is that correct?

A. Yes, sir.

Q. Now in making up your chart of value of common customer sales, did you give any effect to price increases?

A. Not over the two-year period, no.

The Court: These common customer charts bear no relation to what end use the common customer might put the [fols. 3186-3272] product, do they?

The Witness: No, your Honor, they do not.

The Court: For all that appears here the end uses for which metal or glass are sold to the common customer might be entirely different; would bear no relation one to the other?

The Witness: That is possible, yes.

Mr. Johnson: Now at this point, your Honor, in order to—

The Court: Well, at this point, Mr. Johnson, it is 25 minutes of 5, and it would seem to me that this might be an appropriate time to take a recess until tomorrow morning. However, if there is something that you want to finish up tonight, so that when we stop we don't leave something hanging in the air, maybe you can go ahead for awhile longer.

Mr. Johnson: No, this is a convenient place, as convenient as any.

[fol. 3273] JULIUS H. TOLTON resumed.

Mr. Kostelnik: Your Honor, since I believe any representation on our part is no longer needed, since I assume I am no longer exactly a welcome guest, may I be excused? [fol. 3274] The Court: Yes, very good, sir. It is a little difficult to keep track of who is supposed to be here at any given moment, but I think now you are excused, and not only excused, but I must ask you to leave.

Mr. Kostelnik: Thank you, sir.

The Witness: If your Honor please, for just a moment, yesterday there was a problem in our chart book, the second section, which dealt with disclosing the shares or per cents pertaining to American, Continental and National Can, and as I understand, we were to reveal to you but not to the remainder, to the defense counsel, those shares as they appeared in the pages in the chart book, section 2.

So in order to bring that about, we have set them out in typewritten form, and this will be the Court's copy, and then we will have one for ourselves, and these will relate to the given pages named there as to the shares of American, Continental and National Can Company.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Well, first of all, we will mark this as a Court's exhibit.

Mr. McManus: That's right.

(Marked Court's Exhibit 13 for identification.)

[fol. 3275] Mr. Greenberg: I would like the record to show that we made an original and one copy, and no other copy.

The Court: Yes. I told you yesterday, after I got these confidential figures, which will be marked as a Court's exhibit and sealed for purposes of the record—at least at this time—I will try to relate these figures to the various charts in some manner that might be helpful in terms of solving the defendants' problems as to what the breakdown was.

I wonder if I can approach it this way: For example, let us take the chart on page 24, which is entitled "metal can shipments, '55", "total industry", "leading three com-

panies" and "all others" et cetera. I think I could say this to you—and I will ask for your comments after I make this statement—that the American Can's share of the red line or the top line denominated as "leading three", which amounts to 76 per cent, according to the legend—American has the largest share, Continental has the next largest share, which is not very substantially less than American's share, and the share of National Can is very substantially less than either of them.

Now, is that sufficient for your purposes, gentlemen?

[fol. 3276] Mr. Johnson: Yes, sir. I have no difficulty with that. I have, as I said yesterday, objections based on this method of treating these figures, that is, this method of portraying.

The Court: Yes. That is, you are not—

Mr. Johnson: I have no comment otherwise to make on it.

The Court: All right. I will do this chart by chart as I go along.

I will then go to chart 25, 1955 metal cans, fruit and vegetables. The share of American Can is the largest. The share of Continental Can is somewhat less than the share of American Can. The share of National Can is very substantially less than either of them.

With respect to 26, evaporated and condensed milk, as I understand it, the figure represents only Continental, and there are no figures for either American or National included.

Mr. McManus: Your Honor, this, if you will notice, is because looking at the chart—do you have it in front of you?

The Court: Yes.

[fol. 3277] Mr. McManus: Percentage-wise it doesn't amount to a tenth of a per cent. In units there is just a little bit in difference.

The Court: All right. A shade is going to make no difference.

Mr. McManus: That is right, your Honor.

The Court: It does not appear on the list that was furnished to me.

Mr. McManus: That is right. In the units.

The Court: All right.

Now we go to 27. In 27, the share of Continental is largest. The share of American is less than that of Continental.

The share of National is very, very substantially less than either, a relatively small proportion.

With respect to 28, the share of American is considerably larger than the other two, and I think I can go so far as to say represents more than half of the total. Where I do not indicate that there is more than half the total, it means that there is less than half the total.

The share of Continental is considerably less than the share of American, and the share of National is minimal.

[fol. 3278] As to table 29, which is "fish and sea food", the share of American is largest and in excess of 50 per cent of the total. The share of Continental is considerably less than that of American and represents the balance of the total. There are no figures for National in that bar of the chart.

As to 30, "coffee", American has very much the largest total, considerably in excess of 50 per cent. Continental has all of the balance. There is no figure for National in that total.

As to 31, the figure of American represents by far the largest proportion of the total and is considerably in excess of 50 per cent. The share of Continental is very substantially less than that of American and accounts for all but a minimal amount of the balance, the minimal amount being ascribed to National.

With respect to chart 32, "beer", American has the largest total, which is slightly in excess of 50 per cent. Continental has somewhat less than American, and National has a total which is very considerably lower than either of the others.

With respect to chart 33, "pet food", the largest figure in that total is that of Continental. The figure of American [fol. 3279] is somewhat less than that of Continental, and the figure of National is somewhat less than American.

As to 34, which is "oil, open top", the largest figure, the largest proportion is that of Continental. The figure of American is slightly lower than Continental, and National has the balance, which is substantially smaller than either of the other two.

35, "soft drinks", American has the largest proportion of the bar total. Continental's total is somewhat less than

American's, and National Can's total is considerably less than that of Continental.

As to 36, "all other food, soap, et cetera", American has the largest total. Continental has considerably less than the total of American, and National has a minimal amount.

With respect to 37, American has the largest proportion of that total. Continental has considerably less, and National has substantially less than Continental.

All right, gentlemen.

Now, Mr. Clerk, will you be good enough to take Court's Exhibit 13 for identification and seal it.

[fol. 3280] The Clerk: Yes.

The Court: And put the title on the sealed envelope; so we will know what it is.

The Clerk: Yes, sir. May I ask one other thing, your Honor: what shall I do with it? Shall I have it impounded or put it in the vault?

The Court: It will be impounded. It will be held with the papers in the case. I do not think we will have to put it in the vault, I am frank to say. It can be left in your custody, Mr. Clerk, and you can do whatever you think will keep it safe, without going to extremes.

Cross-examination.

By Mr. Johnson:

Q. Mr. Tolton, just before we adjourned last evening, we were discussing the tables or the charts under VI in your book of charts. Do you have before you your source material, the volume which was identified as Defendants' Exhibit AA for identification?

A. I do.

Q. And would you look at page 127 of the source book? They are numbered on the upper left-hand corner.

A. 127?

Q. 127, yes. Do you and the heading there, "Union Carbide"?

[fol. 3281] A. Yes. I do.

Q. And under that there are certain subsidiaries of Union Carbide, are there not?

A. Yes. That is right.

Q. That entry shows sales of \$1,000 by the Glass Division in 1957 to Linde Air Products, does it not?

A. Yes. That is right.

Q. Nothing in 1956; is that correct?

A. To Linde Air Products?

Q. To Linde Air Products.

A. Yes.

Q. And that entry also shows sales by the Glass Division in 1956 of \$1,000 to Visking, does it not?

The Court: To what?

Mr. Johnson: Visking. It is carried over on the following page.

The Court: All right.

Q. (Continuing)—and it shows no sale by the Glass Division to Visking in 1957; is that correct?

A. That's right.

Q. The total indicated sales of the Metal Division for the Union Carbide for 1956 is \$209,000; is it not?

[fol. 3282] A. That's right.

Q. Is that amount of \$209,000 included with your 1956 total?

A. It is, because we considered only the parent company and did not go into the subsidiaries.

Q. So the \$209,000 would be included?

A. Yes.

Q. Would it not?

A. Yes. That's right.

Q. And your table also includes the \$428,000 of sales by the Metal Division in 1957; is that correct?

A. That's right.

Q. The result of including those two figures shows an increase of somewhat over \$200,000 in your Metal Division sales between the two years; is that correct?

A. That's right.

Q. And that is reflected in your tables?

A. That would be, yes.

Q. The only reason that that increase of \$200,000 is shown on your table is because of these two separate \$1,000 sales by the Glass Division to separate subsidiaries of Union Carbide; is that true?

[fol. 3283] A. That's correct in this instance. That's right.

Mr. Johnson: Do you follow, your Honor?

The Court: Oh, yes.

Mr. McManus: Which chart are you talking about, if I may?

The Court: 86, page 86. Common customer sales, we are talking about.

Q. Now, will you look on page 44 of the source book; do you see the heading "Falstaff Brewing"?

A. Yes.

Q. Now that shows no sales by the Hazel-Atlas Division in 1956, does it?

A. That's right.

Q. And in the Metal Division column it shows sales in 1957 of about \$16,000,000.

A. Yes, that's right.

Q. And about \$13,000,000 in 1956.

A. That's right.

Q. Now isn't it true that the way you constructed your chart, that no part of the sales made to Falstaff in 1956 was included in your total metal division sales?

A. That's right.

Q. On your chart?

A. That's right.

[fol. 3284] Q. And isn't it true that the way you constructed your chart, all of the \$16,000,000 for 1957 was included?

A. That's right; that's right.

The Court: Well, now, wait a minute. Let me go back.

These say that there was nothing included for Falstaff in '56; right?

The Witness: That's right; that's right.

The Court: And because Hazel-Atlas sold them a thousand dollars worth of merchandise in '57, you upped this whole total by almost \$16,000,000; is that right?

The Witness: Yes, in relation to the metal, on the metal; that's right.

By Mr. Johnson:

Q. Now, sir, will you look at page 112 of the source book, under the heading "Sinclair Oil and subsidiaries," at the very bottom of the page. Now that shows Metal Division sales of \$3,331,000 for 1956, does it not?

A. That's right.

Q. And the way you constructed your table, none of that \$3,331,000 would be in your 1956 metal sales; is that correct? [fol. 3285] A. That's right.

Q. Now you will see that the following year, 1957, metal sales indicated as \$2,818,000.

A. That's right.

Q. For 1957. Were those \$2,818,000 included in your '57 table?

A. They would be, yes.

Q. So the result of \$1,000 sales by Hazel-Atlas division is that you increased the metal sales figure by \$2,818,000.

A. That's right.

Q. Notwithstanding the fact that the Metal Division sales to Sinclair in that year were about half a million dollars less than they were in the preceding year?

A. That's right.

The Court: The preceding year's figure, \$3,000,000 plus, was not in the '56 bar?

The Witness: That's right.

Q. Do you have any idea what products were sold by Hazel-Atlas to Sinclair Oil?

A. No, I don't.

Q. Do you know that Hazel-Atlas sold and sells other items, other than containers?

A. Perhaps. I would accept your word.

[fol. 3286] Q. Do you know that the Metal Division of Continental sells other things than containers?

A. Yes.

Mr. Johnson: Your Honor, I could go on, but I am aware of your admonition.

The Court: Yes. I take it that if you went on you would not be doing anything else than multiplying things of this nature.

Mr. Johnson: Yes, sir.

Mr. McManus: Your Honor, I would not like the inference to be made, because on redirect I think we can show that lots of these customers are a big bulk of common for each year. I am not saying that Mr. Johnson can't pick out ten, but I think going beyond ten, much beyond ten, would be very difficult. That is my point.

The Court: All right.

Q. Would you turn now, Mr. Tolton, to your chart under your heading IX. That is "United States shipments of screw, thread and lug type closures."

A. Yes.

Q. "Tin mill products."

A. Yes.

Q. Do you know if tube caps are made of tin?

[fol. 3287] A. What?

Q. Tube caps are made of tin? Are they tin mill products, I should say?

A. I wouldn't know, sir.

Q. So you wouldn't know whether or not they were included in this figure "U.S. total," is that true?

A. I wouldn't know other than what the census indicates.

Q. Would you look at the next table in that group? That is headed "Shipments of Crown caps."

A. Yes.

Q. In caption you have "the remaining segment of United States total." Will you tell me what you mean by that?

A. Well, the census figures give what you call a "U.S. total."

Q. Excuse me. "U.S. total" of what?

A. With respect to Crown caps.

Q. I see. So what you mean to say is "U.S. total of Crown caps"; is that what you mean to say?

A. That is what I had in mind.

Q. Would you turn to chart under section VII?

A. VII?

[fol. 3288] Q. How did you make up this chart? I am looking at the first chart in the section.

A. All right. The basic information was secured from the Internal Revenue Service. They have a Division of Statistics, which furnishes—well, not to everyone's use—but they call it their source book of information, which is open to scholars and other people who find it essential to use it.

They develop what they call industry statistics, generally following the classification or standard industrial classification for that which relates to industries, and in this instance this set of figures from them related to tin can and other tinware industry, as it is called.

Q. What do you understand that term to mean?

A. Well, I have the definition here about that, so I'd just as soon if I could refer to it.

Q. I have no objection.

A. I am reading now from "Instructions for coding industrial activity.

"Corporation income tax returns, Form 1120.

"U.S. Treasury Department—Internal Revenue Service—Statistics Division coding unit.

"May, 1956 (revised).

[fol. 3289] "Publication No. 287."

And I have on page 24, at the top:

"Major group 34—fabricated metal products except ordnance, machinery and transportation equipment."

Now, within that major group 34 there is a 340 group, called "Tin cans and other tinware," and that says, defines it:

"Tin cans: beer, oil, milk, ice cream and general line.

"Other tinware (except household and hospital utensils)."

That is the definition.

The Court: Mr. Johnson, I have to take a telephone call, so we will take a short recess.

(Short recess.)

The Court: I would like to have the last question and answer, please, repeat it.

(Record read.)

By Mr. Johnson:

Q. Will you look at the first table under section II of your chart.

A. First table?

Q. Under II of your chart book.

A. Oh.

[fol. 3290] Q. In the caption of that chart you refer to "total industry," do you not?

A. Yes, yes, sir; I do.

Q. Now, the "total industry" referred to there, and the industry referred to in the caption of the first table under VII are not synonymous, are they?

A. I will answer your question just in a second. What I am looking for is the standard industrial classification numbers associated with the census material. I know it is in the 34 grouping.

The Court: You are talking about census material?

The Witness: Yes. He asked me, in the sense of comparison there, to see whether it was synonymous, and I was trying to check through my charts for industry material here to see if there was the same 340 grouping there. That was what he was trying to do.

Mr. McManus: Your Honor, I think we are getting very technical. If Mr. Johnson is trying to ascertain if on page 89 "tin can and other tinware," if there is something included within that group that is not included back on page 24, which says "metal can shipments," the government is [fol. 3291] willing to stipulate that there well could be and there probably is.

Is that what you are trying to get, Mr. Johnson?

Mr. Johnson: Yes, sir.

The Court: All right.

Q. So that with that stipulation the reference to industry is defined in different ways, is it not?

A. Yes. I am sorry if I misunderstood you.

Q. Now, looking again at this table, the first one under VII, isn't it true that if a company is included as being in the industry which is defined as "tin can and other tinware industry," its total sales, whether of tinware or not, are included in your table?

A. That's right. The point drawn is, their primary operation is the—

Q. So that if a company made cans and something else, but if the Internal Revenue people decided that its principal

business was cans, all of its sales would be included in your figures in this table?

A. That is right.

[fol. 3292] The Court: Let me ask you this: Assume that a company made some other form of tinware than cans, and no cans. Would it still be included within this?

The Witness: If it follows within the definition.

The Court: If it falls within the definition?

The Witness: Yes, your Honor.

Mr. McManus: Excuse me. I don't want to interrupt, but are we referring back to page 89? Because you are talking about sales, and that's an asset.

Mr. Johnson: Unfortunately, this table was changed after I had the page numbers, so I do not have the page number.

Mr. McManus: Could you just give the definition of the title?

Mr. Johnson: Number of firms and gross sales in industry.

The Witness: It is page 89.

By Mr. Johnson:

Q. Now, if the Internal Revenue Service decided that a company's principal business was something other than [fol. 3293] making cans, but it made cans, would its sales be included in this table?

A. No, it wouldn't be incorporated in this classification.

Q. I think we have had testimony here that Sherwin-Williams Paint Company makes cans. Would its sales figures be included here?

A. I would think not. I would think if Sherwin-Williams primary sales were paint, it would probably fall into the paint category.

Q. Would the same thing be true of Campbell Soup Company?

A. Yes.

Q. Now, Crown Cork & Seal is the largest crown manufacturer in the United States, is it not?

A. I understand that it is.

Q. And it also makes cans, does it not?

A. I think it makes some.

Q. Are its sales included in these gross sales?

A. Well, I haven't studied Crown Cork & Seal enough to

know which its primary operation would be, but whichever it is, I assume it would fall into that classification.

Q. So you can't tell whether their figures are in here [fol. 3294] or not?

A. No, I can't.

Q. In the column to the right of this page, there is the figure 1407. Now, I understand from your legends that that relates to gross sales of firms having over \$100 million in assets; is that correct?

A. That's right.

Q. Would Continental Can's sales be in that group?

A. It would.

Q. And would that 1407 include all of Continental's can sales?

A. It would.

Q. Paper, glass, metal, everything?

Mr. McManus: Your Honor, just a clarification. I think I may be wrong, but is that a sales figure on page 89, or is that an asset figure?

The Witness: No, that is a sales figure on page 89. It says by asset classification but deals with gross sales.

The Court: Grouping is by asset classification. The bar is a sales bar.

Mr. McManus: Thank you, your Honor.

[fol. 3295] By Mr. Johnson:

Q. Now, Mr. Tolton, you have told me that captive manufacturers—

The Court: Wait a minute, before we leave that subject.

By the Court:

Q. 1407 is 1,407,000,000?

A. That is right.

Q. And that would include, you say, all Continental sales?

A. It would, your Honor.

Q. Would it include all American sales?

A. Yes.

Q. I understood Continental—am I wrong on this, this figure?—that Continental's sales in the course of a year were in excess of a billion dollars.

A. That's correct, but this is for 1956.

Q. And I also understood that American's sales, at least at this point, were in excess of a billion dollars?

A. That's correct.

Q. But you say plainly, these two on the red bar in '56 include American and Continental?

A. That's right, and for each year previously.

[fol. 3296] Q. And you say that their total sales at that point, overall, including glass, cardboard, seals, everything, were \$1,407,000,000, roughly?

A. That is right. That is round.

Q. Yes.

A. That is true.

By Mr. Johnson:

Q. Now, if I understand you correctly, you say that captive manufacturers, who make cans for their own use, whose principal business is something else, are excluded from this table.

A. That is right.

Q. And non-tinware sales are not included; is that right?

A. Yes, I thought you said other tinware.

Q. Now, with those inclusions or exclusions, this chart shows nothing about other can companies or about trends in the industry, does it?

A. Well, except by definition in standard industrial classification and how it was utilized by the Internal Revenue Service.

Q. All of the changes between these three columns, as far as you know, could have been accounted for by something other than can sales, could they not?

[fol. 3297] A. Only in the respect that still its primary operation was tin cans. That's the main thing. If it slipped over where it became more of some other type of thing, it would shift into—

Mr. Johnson: I don't think you understood my question. I wonder if I might have it again.

(Question read.)

A. Well, I still think I hold to my contention. I would say yes, as long as it didn't slip over then into having its

primary operation as something other than tin cans; that's all.

Q. All I am saying is, comparing these three columns, there are changes in those three columns.

A. Yes.

Q. All of those changes, from the first column to the second column to the third column, could be the result of increases in sales of things other than cans?

A. I am not trying to—I still hold to my contention. I mean, I agree it could happen as long as it didn't slip over into another category. In other words, let's say if Continental Can made \$200 million of cans one year, and \$100 [fol. 3298] million of other products, well, if its increase went to \$300 million and somehow or other that was due to pasteboards, we will say, a great increase, then it would go over into the pasteboard industry.

Q. Let me clarify that. The difference between the bottom figure of the next-to-the-last column and the last column is 1459, is it not—no, I am sorry; is 459?

A. Yes, that's right.

The Court: 459 million.

Mr. Johnson: 459 million, that's right.

Q. Now, if a company that is included in the bottom part of both of those columns had increased its paper sales by \$459 million between 1950 and 1956, and it still did not go out of its principle business, being can-making, all of that increase would be accounted for by that, would it not?

A. That would be true under that circumstance, that's right.

Q. Now, then, let me try something else. Suppose that a company had \$400,000 in assets in 1946, in which of these columns would its sales be put?

A. It would be presumed—oh, well, in 1946 it would be in the top part of the column there, in the vertical line.

[fol. 3299] Q. Of the left-hand column?

A. Yes, that's right.

Q. Now, suppose that the same company had assets of \$600,000 in 1956.

A. Yes.

Q. In which of the three blocks—I am sorry. If it had

assets of \$600,000 in 1956. In which of the three blocks on the right-hand column would its sales be put?

A. It would be in the polka dot section there.

Q. In the second block from the top?

A. Yes.

Q. So, in other words, because that company had been successful in increasing its assets, your chart would show that the top block had decreased, would it not?

A. That's right.

Q. Now, Mr. Tolton, why did you select the years 1946 1950 and 1956 in making these charts?

A. Well, they were selected because 1946 was the first post-war year. '50 seemed to be about a mid-point, and '56 is the last information we were able to get from the Internal [fol. 3300] Revenue Service. They run about three years behind in their statistics of income.

Mr. Johnson: Would you mark this document, which is entitled "Corporation Income Tax Returns, Statistics of Income, 1956-57," as a defendants' exhibit.

(Defendants' Exhibit GG marked for identification.)

By Mr. Johnson:

Q. Defendants' Exhibit GG for identification is a volume that bears the imprint of the United States Treasury Department. Did you use this book in the preparation of your tables?

A. Well, ours was the original source book that was obtained from the Internal Revenue Service, that's right.

Q. I want you to look at page 135 of this book, which is the 1956-57 volume. You will note in the middle of the page the statement that "Beginning with 1951 a probability sample has been used as the basis of the tabulated data." Do you see that statement?

A. I see it there.

Q. Now, would that indicate to you that the Internal Revenue Service had adopted a different method of compiling statistics between 1950 and 1956?

A. I notice here in an earlier year it says, "Beginning with 1951 a probability sample has been used as the basis

of the tabulated data," which would indicate that in prior years they had had a little different method.

Q. They counted one way before 1951—they had counted one way before 1951 and another way after 1951?

A. Yes. They had the experience of the previous years.

Q. So your table is based on two different methods of computing; is that correct—

A. In—

Q. —in that the probability sample has been used after 1951?

A. Yes, that's right.

Q. Now, the column on your left shows the total of 52 firms; is that correct?

A. That's right.

Mr. Hughes: On the right.

Mr. Johnson: I am sorry.

Q. The column on the right; a total of 52 firms.

Mr. Johnson: Will you mark for identification a volume [fol. 3302] entitled "Corporation Income Tax Returns, Statistics of Income, 1957 and 1958."

(Defendants' Exhibit HH marked for identification.)

Mr. McManus: What is that column—1946? Is that the one you are talking about?

Mr. Johnson: I am talking about 1956.

Q. While we are doing that the column for 1950 indicates 86 firms. Is that correct?

A. Which column was that?

Q. The center column, 1950 column.

A. Eighty-six firms. That's right.

Mr. McManus: What chart are we on?

The Witness: We are on the same chart.

Mr. McManus: 89? All right.

Q. Now, I want to show you Defendant's Exhibit HH for identification, which is another volume, which bears the imprint "United States Treasury Department," containing statistics of income for 1957 and 1958. I want you to look at page 22—

Mr. McManus: Your Honor, I can't see the purpose of going into this. Does this refer to '57 and '58 income?

Mr. Johnson: It does, sir.

[fol. 3303] Mr. McManus: Our chart only relates to 1956, as far as I have been able to ascertain.

The Court: Yes, I know. But, because your chart refers to 1956 and stops there, that is no reason why he isn't, on cross, entitled to go into the material immediately before and after those years in order to test the validity of your chart.

Mr. McManus: All right, your Honor.

The Court: Overruled.

Mr. McManus: All right, your Honor.

By Mr. Johnson:

Q. If you will look at page 22, line 122, which shows "Tin Can and Other Tinware," looking at, first—

A. Yes, I have.

Q. Looking at the first column following that, which indicates the number of returns in that classification, for 1957—

A. You asked me how many—

Q. —will you tell me how many there are?

A. There were 96.

Q. There were 96 in 1957, so if you had carried your chart one year further, it would have shown that there were more companies than there were in 1950, would it not?

[fol. 3304] A. I assume so. I say that because whether the source book is different than this for some reason or other—that's the only exception I would have.

Q. Was that why you stopped at 1956?

A. I stopped at 1956 because that was the last they had in the source book data to offer us, and that seemed to be the year of the—that the merger was consummated, so that would be the reason.

The Court: How do you explain the fact, if at all, Mr. Tolton, that in 1950 there were, as I see it, 86 firms in this category, and in 1956 there were 52 firms in the category, and in 1957 there were 90-odd firms in the category?

The Witness: Well, the only thing I could think, possibly, is this: that there was the difference between primary op-

eration and whether Internal Revenue Service had additional information that there actually were more firms that made tin cans that wasn't their primary operation—

The Court: You just don't know?

The Witness: I just don't know.

By Mr. Johnson:

Q. Tolton, would you turn to your table under your caption VIII.

[fol. 3305] A. VIII? Yes.

The Court: This is the so-called prior acquisition documents?

Mr. Johnson: One of the prior acquisition documents, yes, sir. When I get through, I have a suggestion; or I would make it now, if you like, as to how to handle these.

My thought was that, since decision is being reserved on all of these tables, I could just as well complete my cross examination—

The Court: Oh, I think that's right, Mr. Johnson.

Mr. Johnson: —and this document can then be treated with the—

The Court: With the prior acquisition material that we will be dealing with perhaps on Monday.

Mr. McManus: Your Honor, could I say one thing, too, about this chart before we start?

The Court: Yes.

Mr. McManus: I agreed with defendants in a stipulation that their acquisition of a part or all of Fort Wayne Corrugated Paper Company was not to bear any relationship to this case, and I noticed the other day that in making up this [fol. 3306] chart that was placed on the chart.

Now, I would like to start for the record that we are willing to strike it or to state and ask you not to give any consideration to the fact that they might have acquired an additional interest—

The Court: Where does that appear—Fort Wayne Paper?

Mr. McManus: That is 1950, your Honor, and has to do with paperboard. It is the last one under that—

The Court: I see.

Mr. Johnson: Thank you, Mr. McManus.

The Witness: What other one was there? Was there.—

Mr. McManus: That was the one.

The Witness: I see.

The Court: If that is so, I am going to take this Fort Wayne Paper Company and eliminate it physically from the chart at this time, so we are not bothered with that any more. Let me have your pen, please, Mr. Clerk.

Mr. McManus: Fine, your Honor. I am sorry that got on there.

The Court: All right. I have blocked out Fort Wayne [fol. 3307] Corrugated Paper Company from that chart.

By Mr. Johnson:

Q. Mr. Tolton, your caption relates to the container and related product field. What do you mean by the term "related product"?

A. Well, I think they make machinery and, if I am not mistaken, they have a machinery division and other things like that which would probably be used to, I mean, you know, make some of the products too that they sell, so I would consider that as part of the related operations.

Q. Well, sir, you made this table. Do you know whether you are mistaken or not?

A. Well, I think—I certainly have—I know. I have knowledge that they purchased machinery and equipment and that sort of thing, I mean, through the merger program, or whatever you want to call it, through the years. I think that is—yes, I would say that is right.

Q. I want you to look down under the heading "1930s," the very last entry under that column. Do you see the name Canonsburg Coal Company?

A. Yes, I do.

[fol. 3308] Q. Can you tell me how that is related to the container field?

A. If I may have reference to the Government's Exhibit for identification 786, I think I can answer that.

Mr. Greenberg: I will give him the exhibits, your Honor, but I think Mr. McManus and I both agree we are getting into legal questions.

Mr. McManus: That is all right, he can answer that. There is no problem.

The Court: Let me ask you one thing before you go any

further. With the exception of the Fort Wayne Corrugated Paper Company, are there any domestic acquisitions of Continental Can Company, in the period covered by the chart, which are excluded from the chart?

The Witness: I am afraid I didn't quite understand.

The Court: Let me put it this way. This chart is entitled "Domestic Acquisitions of Continental Can Company in the Container and Related Product Field."

The Witness: Yes.

The Court: Now, I want to know whether the Continental [fol. 3309] Car Company, if you know, made any acquisitions during the '20s, '30s, '40s or '50s, with the exception of the Fort Wayne thing which we have just eliminated, which isn't shown on this chart.

The Witness: Well, I think we tried to exclude any acquisitions outside of the country.

The Court: All right. I understand that. This is domestic acquisitions.

Now, my question is whether there are any domestic acquisitions by Continental Can Company in the '20s, '30s, '40s or '50s which are not included in this chart, with the exception of the Fort Wayne.

The Witness: We tried to cover them all.

The Court: Then what is the point of putting in the "Container and Related Product Field"? Isn't this a chart of all acquisitions of Continental Can Company during this period?

Mr. McManus: Your Honor, could I answer that? Or are you asking the witness?

The Court: I am asking the witness at this point.

The Witness: Well, as near as I can say, your Honor—as near as we can tell, it slipped into this category or categories here.

[fol. 3310] The Court: As I get the impression reading the heading of this chart, to be perfectly frank with you, Mr. Tolton, there are some acquisitions that are not in this chart. But you say there is none as far as you know, except—

The Witness: In the domestic field, as near as I can.

The Court: In the domestic field. All right.

Mr. Greenberg: If the Court please, will the record show

that Mr. Tolton has before him an exhibit which is not in evidence. I just wanted to indicate that to you. It is G—

The Witness: 786.

Mr. Greenberg: G-786.

The Court: All right. What are we looking for at the moment.

Mr. Johnson: The relationship of Canonsburg Coal Company.

The Court: Oh, yes.

Mr. Handler: He is looking in the wrong place.

The Witness: I think that's right. 26. Thank you.

[fol. 3311] By Mr. Johnson:

Q. Now, sir, we have waited a long time for you to refer to your material. Will you tell us what relationship Canonsburg Coal Company has to the container field?

A. It says, "In January, 1934, Continental organized the Canonsburg Coal Company"——

The Court: What are you reading from?

The Witness: I am reading from Government's Exhibit for identification 786.

The Court: What page?

The Witness: Page 21—21 in the typed——

The Court: Typed 21?

The Witness: That's right. And it is No. 26 at the top of the page.

The Court: All right.

A. I will read the whole thing.

"In 1933 Continental purchased the Hazel Mines of Chartier Creek Coal Company"——

Q. Excuse me. Can't you answer the question without reading from this document?

A. Well, I wanted to get to the point. It says it is a subsidiary of Standard Tin Plate Company; to operate this property, and it was disposed of in 1941.

[fol. 3311a] I just went down the paragraph this way.

[fol. 3312] Q. You are reading about something, about mining rights covering 500 acres of coal, coal mining equipment; is that what you are reading about?

A. That's right, as a subsidiary of Standard Tinplate Company.

Q. And that was the Cannonsburg Coal Company?

A. That's right.

The Court: And as I read this number 26, it says "The coal mine was adjacent to the property then owned by Continental and was acquired as a source of supply to it"; is that right?

The Witness: I see that, yes, your Honor.

Q. Now, Mr. Tolton, under the column headed "1940s," there is a reference to Marco Chemicals, Inc.; will you tell me what relationship that has to the container field?

A. Well, that is also in this document. Do you know which number it is offhand, without my having to run through it?

Q. I do not, sir.

The Court: This appears to be

Mr. Handler: It appears on typewritten page 29, and there is a new number 31. It is number 40, the top of the page.

[fol. 3313] A. It says "The company is engaged in the production of resins, plastic products and chemicals . . . is located in Sewaren, New Jersey." Then there is another one down there "and is the first step in entering the plastic field."

Q. And from that somehow you concluded that that was related to the container field?

A. Right. I'd have to say broadly, in the broad sense of the word, it is related.

Q. It is related?

A. Pardon?

Q. It is related to the container field?

A. Well, I can only say plastics ultimately have been made into containers. That is about as far as I could go on it.

Q. Do you know what kind of plastics Marco Chemical, Inc. was manufacturing?

A. No, I didn't.

Q. In whatever year it was bought?

A. I do not.

Q. When you referred to acquisitions in this table, you include acquisitions of machinery?

A. Yes, it did include machinery; that's right.

Q. So it is not all acquisitions of companies you are referring to?

[fol. 3314] A. Well, they were purchased from a company. I am not trying to quibble. I mean, that is—they had to buy them from somebody, and they bought them from a company, and it was the machinery purchased from that company.

The Court: I don't follow you, Mr. Witness. You mean to tell me that if Continental Can decided to acquire \$5,000,000 worth of machinery from another company, it would be listed here?

The Witness: Yes.

The Court: Without purchasing the company?

The Witness: Yes, there is such instances.

The Court: All right, give me such an instance?

The Witness: Well, I think there is an Armour, if I am not mistaken—I just have to run down here.

The Court: Armour & Company, yes.

The Witness: So that was machinery, as I understand, and Owens-Illinois, that was machinery, or at least; at least I guess can making equipment from Owens-Illinois at that period of time.

The Court: That is when they bought the Owens-Illinois [fol. 3315] Can Division, wasn't it?

The Witness: Yes, that would it; that's right.

By Mr. Johnson:

Q. How about Clarkford Paper Company?

The Court: Suppose they bought in a year from some company in the open market \$10,000,000 worth of machinery to refurbish a plant, and they ordered \$10,000,000 of machinery from the XYZ Machinery Company to be made for it; would that be included here?

A. I would think not, for the reason that if XYZ Company made in its course of business machinery for them, that would not be related to an acquisition or acquiring of that type of thing.

By Mr. Johnson:

Q. Mr. Tolton, you have referred to a particular document here from time to time for information. Did you check the Department of Justice files for other information with respect to these acquisitions?

A. Well, I would say in the one that has been stricken there was some reference to it.

Q. I am not talking about that one.

A. Oh.

Q. I am not discussing that one.

A. All right. No, I don't think, I don't think I personally [fol. 3316] did. I don't think I did.

Q. You qualify that by saying you personally did; did you have it done for you?

A. No, I didn't. I put it this way: I came into the case a little later in the matter, and there had been some work done—well, I say work done, I mean, looking into the acquisition kind of program, I would say, and so to that extent I didn't personally look into these—into that element of it.

Q. Did you check the Department of Justice files to determine if the acquisition of any of these companies was encouraged by the Department of Justice?

Mr. McManus: Your Honor, I object to that question. I object to him asking a question which was put, because it is my position and the government's position that the Department of Justice doesn't encourage acquisitions. He has already said that he didn't look up any of this in the file.

The Court: That is your position, Mr. McManus.

Mr. McManus: Well, I would like to have it made clear for the record.

The Court: You say the Department doesn't encourage.

Mr. McManus: Yes.

[fol. 3317] The Court: All right, I will overrule the objection. You made your statement.

By Mr. Johnson:

Q. Will you answer the question?

A. Repeat it, please.

The Court: Yes, have it repeated.

(Question read.)

A. I did not.

Q. Mr. Tolton, can you tell me which of the companies that are named on this chart were subsequently sold by Continental Can?

A. No, I could not. I mean, I could develop it, but I could not at this time do it.

Q. What do you mean "could develop"?

A. Well, if I looked through materials that have been given us in this case, and all that, I don't know, perhaps I could locate such information if there is any, if there is any such sales made.

Q. But you didn't try to do that?

A. Pardon?

Q. But you didn't try to do that?

A. I would say not.

Q. You were content to leave the impression that all these companies had been acquired by Continental?

[fol. 3318] Mr. McManus: Your Honor, I object. I mean, Mr. Johnson is testifying here. I mean, he is answering.

The Court: The objection, Mr. McManus, is overruled. This is cross-examination.

Go ahead.

(Question read.)

Mr. McManus: Your Honor, I don't want to keep interrupting, but to questions of that type will I have a continuing objection?

The Court: Oh, yes, you can have all the objections you want. They are overruled.

Finish your question, Mr. Johnson.

Q. You were content to leave the impression that these companies had been acquired by Continental and retained by it; is that correct?

A. Well, that asks me for a state of mind, that is all I can say. But I am not—I wasn't content to leave them, although I did not look into it. Now if that can split a hair, that is about what happened.

Q. You think someone reading this chart would get that impression?

A. Well certainly what the chart says, these were acquisitions and it kind of speaks for itself, and that is as far as [fol. 3319] I can go.

Q. I see. These were acquisitions, and that was all.

A. All right.

Q. No other information. Mr. Tolton, how did you make these classifications, shown on the right-hand of the table?

A. On the left?

Q. Shown on the left-hand side of the table?

A. Well, from the documents that I utilized in order to draw it up.

Q. In the last column under "1950s," you have Bowes Industries, Inc.

A. In what one was that?

Q. Under the 1950s, under "flexible packaging."

A. Yes, I see it there.

Q. Will you tell me what Bowes Industries made?

A. Without the document G-785 I couldn't at this time, except that I assume it related to the—to the flexible packaging field.

Q. What would you call the flexible packaging field for this purpose?

A. Well, it could make polyethylene, it could make, oh, glassine, wax paper—those would be in the paper field, [fol. 3320] excuse me. I can't think of the principal one that DuPont makes.

By the Court:

Q. Well, let me ask you this: I understand that as far as I could see, from looking at Exhibit 787, the one you have been referring to, 786 or 787, as the case may be, that only goes up to the 1940s, doesn't it?

Mr. Handler: It is the next exhibit, your Honor.

A. There is another one, your Honor.

The Court: Is there another one?

Mr. Handler: Yes.

The Witness: 785 actually preceded this one and was for a later period of time.

The Court: I see.

The Witness: I was trying to think. Cellophane is what

I had in mind from DuPont, that sort of product, as part of the flexible packaging field.

By Mr. Johnson:

Q. Now you are referring to another document; is that the document from which you got your information with respect to Bowes Industries?

Mr. McManus: What is the number?

[fol. 3321] The Witness: Oh, it is Government's Exhibit for identification 785.

Q. So with that in front of you, can you tell me why you classified Bowes Industries, Inc. as a flexible packaging company?

A. The only one I could see in there, if napkins had something—has a flexibleness about them, that would be the only reason that it got in there.

Q. So that becomes your basis for classifying that as flexible packaging?

A. I am afraid that would be the only one there.

Q. In a field related to the container industry; is that correct?

A. Yes—well, there are others here that indicated it is in it, I think in the container field, but I meant—

Q. I see. What are they?

A. Well, there is plastic coated paper plates. Then there is napkins, plastic knives, forks, spoons and cups, and then purchase from outside suppliers for the purpose of resale.

Q. Which of those do you regard as related to the container field?

A. Probably the cups.

[fol. 3322] Q. I see a reference here in the 1920s to Penick & Ford. You really mean to imply that Continental Can acquired Penick & Ford?

A. Where is that located?

The Court: In the top upper left-hand square under the 1920s.

The Witness: Oh, I see it. G-786.

A. Well, this is on page 16 of G-786. It goes 16 and 17 in the typewritten figures. When you ask me this, I have to refer to page 17, Mr. Johnson.

"Penick & Ford sold its can business to Continental, because it felt that Continental could effect large scale economies in its operation, thus supply cans at lower cost than Penick & Ford have been able to realize. In this way Continental acquired an important customer."

Q. So that acquisition back in the 1920s was a part of Penick & Ford and not Penick & Ford; is that right?

A. Oh, in total, purchased the can business. Then I presume—yes, they had other business.

Q. Look down, Mr. Tolton, in the very last entry under 1940s, Vulcan DeTinning Company.

A. Yes.

[fol. 3323] Q. Do you know what the largest interest Continental ever had in Vulcan DeTinning was?

A. I think they had a 51-4/10 per cent stock interest, is my reflection at this time.

Q. That is what you think they had, is it?

A. Yes—well, I saw it in Moody's, and I saw it referred to in—not the per cent, precise per cent—but in the Continental's annual report.

Q. Do you know how much they have now?

A. I couldn't say.

Q. Would you look in the column 1950s, next to the last item, Tenco, Inc.; do you know what that company was?

A. I am looking for it. Just a moment.

Government's Exhibit 785, on page 6, shows Tenco, Inc. of Winona, Minnesota, and it was plastic pipefittings. That is all it is.

Q. Plastic pipefittings?

A. That's right.

Q. This is something you regarded as related to a product in the container field; is that correct?

A. Yes, in the "all other" category.

Q. I want you to go back to your caption again, and in the light of what you said a moment ago will you try to [fol. 3324] define for me what you meant by "acquisitions"?

A. Well, I think there is considerable debate. Probably what—merger or acquisition—but it would be the acquiring of the facilities or a major stock interest—I think those two probably would incorporate the two main areas, or prob-

able means of acquiring an interest, of which then you exact a degree of control.

Q. You know that Vulcan DeTinning Company is listed on the New York Stock Exchange?

A. You mean presently?

Q. Yes, sir; either under that name or some other name?

A. No, sir; I'm not aware, except your thought.

Q. Did you make any effort to ascertain whether it was so listed or not?

A. I may have seen it on occasion, but I couldn't readily say when or where I had seen it.

Q. Do you know that owners of over 10 per cent of the outstanding equity stock of any stock listed on the New York Stock Exchange are required to report their holdings to the Securities and Exchange Commission?

Mr. McManus: What period of time are you talking about?

[fol. 3325] Mr. Johnson: Any period of time since 1934 on.

Mr. McManus: No, I mean the question, what period of time was the question directed to?

Mr. Johnson: Any time.

Q. Did you know that they were required to report, that any holder of over 10 per cent equity stock of any corporation listed on the New York Stock Exchange is required to report its holdings to the Securities and Exchange Commission?

A. Well, I have certainly been in to the Securities and Exchange Commission, but I didn't know all the items which they had to, I mean, to make reportings and refer to. There is considerable amount of information they have to furnish the SEC.

Q. So you didn't try to get any information that might have been available with respect to these companies, outside of these few documents you have been referring to; is that right?

A. Well, I have looked into SEC records from time to time, yes.

Q. In connection with this preparation, the preparation of this table?

A. Well, as it relates to acquisitions, because they, they

[fol. 3326] made—well, I was trying to think back—Hazel-Atlas—sav, the Hazel-Atlas acquisition. They put out a prospectus and other material, of which they have to furnish the SEC, and I have looked at that data and the information from time to time, not in complete detail, but I have looked at it.

Q. Mr. Tolton, how much of this chart that we are discussing now did you prepare yourself?

A. Well, the whole chart was prepared under my supervision.

Q. And the information was gathered under your supervision?

A. Well, not wholly in the sense that some—some came into my province, I should say, after I came into this matter.

Mr. Johnson: May I have just one moment, your Honor?

The Court: Yes.

Mr. Johnson: To look at my notes?

The Court: Yes.

Mr. Johnson: I have no further questions of this witness.

The Court: Have you any redirect, Mr. McManus?

[fol. 3327] Mr. McManus: Yes, sir.

Redirect examination.

By Mr. McManus:

Q. Staying on page 92 of Government's Exhibit 800, that is the domestic acquisitions of Continental Can Company and data in related products field, the source of your information that you drew upon was the submission of Continental Can Company in connection with FTC study of acquisitions?

A. That is right.

Q. And the annual reports of Continental Can?

A. Yes.

Q. Moody's Industrials?

A. Yes.

Q. And Continental Can's proxy statement of October 26, 1956. Now, could you tell me what proxy statement that relates to?

A. I think that was the Hazel-Atlas one, I am not sure. It may have had other considerations, I am not—just one

moment. I have it right here and I can readily ascertain.

Within this proxy statement, which is Continental Can Company, Inc., "Notice of proxy statement of special meeting of common and preferred stockholders to be held October 26, 1956."

[fol. 3328] It has listed—well, I am just going to the index here, which precedes page 1, and the purpose of meeting is section 1. Section 2 is summary of terms of merger; section 3 business of Gair.

Q. That's right, Mr. Tolton. I just want to find out if that is the one that you used?

A. Yes, that's right.

Mr. McManus: Your Honor, I think I can cut this this redirect examination on this chart considerably by saying that some of the other data that we have offered, and which we are going to argue should be admitted on past acquisitions would explain in considerably more detail, in more detail than the chart, what was involved with the acquisition of the companies, and things of that nature. So if that data would go in, and when and if it does go in, it would explain in more detail.

I can see no purpose in going into that at this point.

The Court: All right.

Q. Now, you were asked the question if tube caps are made out of metal; do you know what tube caps are, Mr. Tolton?

A. I think as one who used them I might know.

[fol. 3329] Q. What would you consider a tube cap?

A. Well, it would go on like toothpaste or some such product as that.

Q. Would they be plastic or metal?

A. Well, I think I have seen them either.

Q. I see. So a tube cap could be plastic or it could be metal?

A. Yes.

Q. Depending on what type of tube cap you are looking at; is that correct?

A. That's right.

Q. Now going to Government's Exhibit 800 for identification, page 89, that deals with tin can and other tinware, and is based on sales figures there.

A. The gross sales, yes.

Q. Now Mr. Johnson indicated to you or showed to you a publication of Internal Revenue, which indicated that there were additional companies in 1957 that were doing other than what they were in 1956; is that correct?

A. Yes, that's right.

Q. Now I want to ask one more question: If a company fails to file an income tax return, would it be in this classification?

[fol. 3330] A. No, it would not.

Q. If a company was bankrupt and had no assets, would it be in this classification?

A. Well, let's see, bankrupt.

What I am getting at is this, they showed some that have net income and no net income. If they were still in operation and showed a loss, it would appear in here. Now if they were completely out of existence, it wouldn't show in here.

Q. Now, the next chart, page 90, I don't think Mr. Johnson asked you about that in any detail. Could you explain to his Honor what that is supposed to portray?

A. Well, the previous one aligned the companies on the basis of, or within those groupings on the basis of gross sales. This one was assembled on the basis of their total assets.

Q. And in this chart the figure 2, referring to the heavy black bar on the bottom part of the bar—

The Court: The red bar.

Q.—the red bar in the original, that is referring to companies, American Can Company and Continental Can Company?

A. That's right.

[fol. 3331] Q. And the same thing would be true in 1950?

A. Yes, the same would be true.

Q. And the same thing would be true in 1957?

A. That's right.

Q. In going to—Mr. Johnson asked you if you knew if the Department of Justice attempted to encourage any of these acquisitions in this Government's Exhibit 800, if you knew, and your answer—what was your answer?

A. I do not know.

Q. Do you happen to know if they tried to discourage any of these acquisitions?

A. Not—

Q. Other than the present one or Robert Gair?

A. Well, not specifically, except—

Q. You just don't have knowledge if they encouraged or discouraged; is that correct?

A. In this particular area, that's right.

Mr. McManus: Thank you.

That is all I have, your Honor.

The Court: All right.

Well now, gentlemen, it seems to me—have you anything further with this witness, Mr. Johnson?

Mr. Johnson: No sir.

[fols. 3332-3337] I wanted to ask your Honor's pleasure on how you want to consider these various documents?

The Court: Well, you may step down, Mr. Witness. Thank you.

(Witness excused.)

[fol. 3338] New York, October 17, 1960, 10:30 A.M.

Trial resumed

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Before we begin this morning, is there any reason, as you gentlemen see it, for having this hearing in camera?

Mr. Johnson: No, sir; I don't think so.

Mr. McManus: Not on the part of the government.

The Court: Very good.

Mr. McManus: Your Honor, it was my understanding that our procedure this morning was divided into three parts. The first was, the government was to offer its statistical data. The second was a discussion or argument on prior acquisitions; and the third part, the offering of additional documents that the government had indicated it would like to make an offer on.

[fol. 3339] The Court: That is as I understand it.

Mr. McManus: Now, the first part, your Honor, on the tables and charts, as I understood your instructions, the government was to offer these tables and charts, and the defendant was to make such objections or comments as they desired. Then the government would have a chance to offer them. Now, I presume the best way to do it is to proceed in the same sequence as we had heretofore, and the government now offers Government's Exhibit for identification 801, which is entitled "Folder A."

The Court: Well, now, didn't I gain the impression—I may be mistaken in this—that Mr. Johnson felt if the government offered all of its exhibits at the same time, that is, the chart exhibits, there might be a relation between them and it would be better from the standpoint of the presentation to have them all before the Court at the same time?

Am I correct in that, Mr. Johnson?

Mr. Johnson: Yes, sir. It is my understanding that they have all actually been offered.

The Court: I understand that, but I think the record [fol. 3340] will read better and more clearly if we repeat the offer now and then go on from there.

Mr. Johnson: Yes.

Mr. McManus: The government would like to offer, your Honor, Government's Exhibit 800, Government's Exhibit 801—

The Court: Wait a minute. Let's have those so I get them. Now, 800 is?

Mr. McManus: Excuse me, your Honor. Could I withdraw that and start with 801? That is the sequence we followed, because that is the table.

The Court: Yes.

Mr. McManus: Government would like to offer Government's Exhibit 801 for identification, which is also indicated as "Folder A"; Government's Exhibit 802 for identification, which is also marked "Folder B"; Government's Exhibit 803 for identification, which is also marked "Folder C"; Government's Exhibit 800, which is also marked "Plaintiff's chart book 1", and the government would also like to offer, your Honor, Government's Exhibit 1202, which is the underlying data for a number of these tables and charts.

The Court: Now let me ask you this: Does this include [fol. 3340a] the so-called plastic charts?

Mr. McManus: It doesn't, your Honor.

The Court: I think you'd better offer those at the same time.

Mr. McManus: The government offers Government's Exhibit 809, in addition, your Honor.

[fol. 3341] Mr. Handler: Your Honor, may I interrupt the proceedings a moment, please?

The Court: Yes, Mr. Handler.

Mr. Handler: I just came into the courtroom and received from government counsel a memorandum of law on prior acquisitions which I am going to try to read between now and the time that I get up to argue the point.

I would like to ask counsel whether they have written a brief on the motion to dismiss, because, if they do have one, I think they ought to give it to me now and not two minutes before the argument commences.

The Court: All right. What do you say to that, Mr. McManus?

Mr. McManus: Your Honor, we are going to have a little two-page memorandum in opposition to the brief that you handed us Friday evening, at the close, Mr. Handler, which I think we would have ready this evening. It is pretty much hornbook law—at least we assume it is—much as Mr. Handler's was.

[fol. 3342] The Court: I see. Well, I will be interested to receive that, but I don't really think that this is a subject that should take very much in the argument. As I see it, the government has offered six separate exhibits, which include the sets of tables on tin and glass, so called, the chart book, the Can Manufacturers Institute annual report and the plastic charts.

Now, there is nothing else that you are presently offering in the way of supporting data?

Mr. McManus: At the present time, that is right.

The Court: At the present time.

All right, Mr. Johnson.

ARGUMENT OF MR. JOHNSON

Mr. Johnson: With that, then, I understand that we have before us the tables and the charts offered on the witnesses Finn, Tolton and Hughes.

Your Honor, statistics have a useful place in economic and business analysis, but in the hands of the unwary they become a trap, and in the hands of the unskilled they are positively dangerous.

[fol. 3343] The government here would have the Court believe that these witnesses merely took some data and performed a mechanical operation in putting it into tabular form, but that clearly is not so. Each of these three witnesses selected and adjusted and attempted to analyze data. Some of the data that have been presented here are based, in the first instance, at least, on census data.

Census data, handled by the Bureau of the Census, is handled by highly skilled experts. But even so, it is not without its difficulties, and in this connection I refer to a letter by the Director of the Bureau of the Census, which was quoted by the Court of Appeals in the Seventh Circuit in Federal Trade Commission vs. Dilger, 276 F. 2d 739, in which the Director of the Bureau referred to the necessity of making approximations in census reporting.

I wish to make it clear, however, that my objections to the material here presented are not based on difficulties with the primary census material. My objections go to the manner of the use of that material.

[fol. 3344] Also, my objections are not based primarily on the simple mathematical aspects of the material presented. It is true what I was able, by being able to focus on certain of the arithmetic, to uncover at least one major error, which was immediately corrected.

Now, in the areas in which I could not focus because of lack of access to underlying data, the errors, if any, go uncorrected and undetected.

Your Honor, I object to these tables and charts. It is really improper to dignify them by calling them statistics because they are misleading and false by virtue of the manner in which they have been constructed.

Data presented in the form of figures can be misleading in many ways. The government has no more right to present half truths than it has to present untruths.

In my law practice I do a considerable amount of securities work. I was once on the staff of the Securities and Exchange Commission. The securities laws are explicit in forbidding not only the use of misleading statements but in forbidding the omission of facts necessary to make the statements made not misleading. This is a sound principle and generally accepted throughout the law, and, your Honor, it is this principle, among many others, which the Department of Justice has here overlooked.

I do not exaggerate when I say that if a company, in selling its securities to the public, were to use in its selling literature data prepared the way the data here proffered have been prepared, the Securities and Exchange Commission would cause the officers of that company to be sent to jail and they would use the instrumentalities of this court to do it. Similarly, if a company were to use data prepared the way these data have been prepared in its advertising, the Federal Trade Commission would cause cease and desist orders to be issued, and they would enforce those orders through the United States courts.

The technique of selection and omission is clear throughout this material. For example, they omit American Can [fol. 3346] Hawaiian production and say they do it because Continental doesn't manufacture it. They omit plastic caps because they say neither Continental nor Hazel made them. But when I ask why they include glass containers for fresh milk, which admittedly neither Continental nor Hazel-Atlas manufacture, they simply look astonished and say they don't see any reason why they should be included.

It is primarily the methodology, then, that I am concerned with. The government has chosen sometimes to cut their material, sometimes to stretch it, but it seems never to have occurred to them that an honest presentation should be a consideration.

I want to start my objections with tables 3 C and 4 C.

The Court: Are you now referring to 801?

Mr. Johnson: To 803.

The Court: 803. And give me those again. 3 C — [fol. 3347] Mr. Johnson: 3 C and 4 C.

Your Honor will recall that it was disclosed on cross examination that these figures were chosen from among many in the underlying material. The extent or nature of the

choice, as in so much of this material, is not apparent from the face of the tables and would never have been disclosed except for cross examination.

As a result of the choice made, the figures which are presented are meaningless for the comparative purpose for which they were selected and the percentages which are set out are percentages which have no meaningful relationship to anything.

Now, sir, would you prefer that I continue or that I wait for rulings on specific documents or groups?

The Court: No, Mr. Johnson. I think the way to do this—I have kept on making notes on these specific charts to which you object, to which you specifically, specially object, as well as your general objection, and any such tables or charts [fol. 3348] I will refer to specifically when I rule.

Mr. Johnson: Very good.

The Court: Unless they are already included within some other general rule. So that we are now dealing with 3 C and 4 C of 803.

Mr. Johnson: My next objection, then, is to 2 C. By measuring Continental against all other manufacturers—

The Court: I am sorry, Mr. Johnson. You have got to go a little slower because I have to follow you.

You said 2 C—

Mr. Johnson: 2 C is also in 803, in folder C. [fol. 3349] The Court: Right.

Mr. Johnson: Here, by measuring Continental against all other manufacturers and omitting to describe such other manufacturers in any way, the table gives a misleading impression of the position of Continental.

The Court: What do you think they should have done? If you were preparing such a chart, what would you show?

Mr. Johnson: At the very least, I would not, I believe, have tried, by computing a percentage for Continental of a total, I would not have limited it to that and given the impression, as I believe they were trying to do here, that Continental was the largest manufacturer in this field.

In connection with this, I turn to Exhibit 800, and I object to the two tables which are included in Section IX.

The Court: Section IX of?

Mr. Johnson: 800 is the book of charts.

The Court: I see.

[fol. 3350] Mr. Johnson: And my objections to those are the same as those to 2C, 3C and 4C. Your Honor will observe that they are related charts.

The Court: Now take the one on what I have marked on my copy as page 94, which shows that Hazel-Atlas in 1958 had four-tenths of the percent of what is alleged to be U.S. shipments of screw, thread and lug type closures.

Mr. McManus: Your Honor, just to correct the record, I think the percentage is 4.7.

The Court: Oh, I see, 4.7 per cent. I see that.

How do you say that is misleading?

Mr. Johnson: By the selection of the hundred per cent, which is the screw type and lug type closure, tin mill products, which your Honor will recall was picked out of this census material to the exclusion of all of the other material referred to.

The Court: Plastic, aluminum, and so forth.

[fol. 3351] Mr. Johnson: Yes.

The Court: Of course, I take it your position is these have to relate to some line of commerce.

Mr. Johnson: I think they are meaningless if they are just figures taken out of the air or selected.

The Court: What do you say is the closure type of commerce which the government is contending, line of commerce, which the government is contending here?

Mr. Johnson: I have so far not been successful in learning what it is.

The Court: All right, sir.

Mr. Johnson: I turn next to Table 5C in Exhibit 803.

The Court: Well, you don't have to argue with on Table 5C.

Mr. Johnson: Very well, sir.

The Court: Thus far, as far as I can see, there has been no basis established for the admission of 5C.

[fol. 3352] Mr. Johnson: I go on then to—

The Court: If after I hear Mr. McManus I should in any way change that conclusion, I will hear you on the subject then.

Mr. Johnson: Yes, sir.

I go on then to 5D, the next following table in 803. This is a chart assigned, Mr. McManus said, to show increase in concentration in the glass container industry. The cross-

examination disclosed that what it really showed were rigged figures. The material is taken from diverse sources, adjusted in various odd, indefensible ways, and the conclusion is finally reached—it is clear, I believe, that the witness himself did not believe it—that there were on January 31, 1960, 29 companies operating glass container plants in the United States.

The Court: As compared with 43 in 1938 and 80 in 1920.

Mr. Johnson: As the witness counted them; yes, sir.

I turn next to Folder A, which is 801. I am looking first [fol. 3353] at Section I of this exhibit, and Sections V and VI of Folder B, Exhibit 802.

The Court: Now, the ones in B are—

Mr. Johnson: V and VI.

The Court: V and VI.

Mr. Johnson: The first table there is headed "Continental U.S. shipments of all types of glass containers east of the Rockies for 1955 compared with the leading manufacturers in that section."

The Court: Yes, sir.

Mr. Johnson: Looking first at Table I(a) in this group, which is the first table in Exhibit 801 for identification; my objection here is directed principally to the misleading concept of "leading manufacturers." The witness admitted that he did not know whether or not these were the leading manufacturers, since he did not have access to data for the whole industry. The objection to the remaining tables in this group is somewhat different, in that I object to the manner of the groupings of the census categories by the witness, which he testified that he had—groupings had been created by him for his own purpose.

The Court will recall, for example, the omission of wine and liquor from I(b). None of the other tables in this group compares with census categories; and Tables I(d) and I(e) committed indefensible error of adding together returnable and non-returnable bottles, an error which the Bureau of the Census has consistently avoided in the presentation of its material.

In my next grouping—

The Court: And this specific objection now goes not only to Section I of 801, but Sections V and VI of 802; is that right?

Mr. Johnson: Yes, sir. They are tables which relate—

The Court: You are considering those are inter-related and your objection applies to all of them, the objections you just stated.

Mr. Johnson: Yes, sir; that is correct.

[fol. 3355] The Court: Very good.

Mr. Johnson: In my next grouping I include all of the tables and the charts which contain unit figures for metal containers. This includes Sections II and III of Folder A, Sections I, II, III, IV and VII of Folder B; that portion of Section III of the book of charts, Exhibit 800 for identification, which relates to metal containers.

The Court: In other words, this objection goes to all figures here which used a unit figure for metal containers of various types.

Mr. Johnson: Yes, sir.

There is one more, Section V of the chart book.

The cross-examination covered fully the weird statistical methods used in creating these figures. I want to remind your Honor that the witness testified that each and every one of these unit figures was based on his computations from the Can Manufacturing Institute material. He explained the method by which he got these figures. He started [fol. 3356] from a hypothetical figure to a number of containers which might have been manufactured from the tons of steel consumed. He misunderstood the nature of this figure. He regarded it as an estimate. Whereas it is clear from the underlying material that it has never been anything except a hypothetical number which might have been made.

The Court: Mr. Johnson, just what do you think that figure is? You say a "hypothetical figure"; what do you think the purpose of putting that figure in the Can Manufacturers Institute table is? What were they after?

Mr. Johnson: Well, sir, Can Manufacturers Institute was here on the stand and the government did not see fit to ask him about this material. For what it is worth I suggest that this material was simply publicity material, released for newspapers, of the kind that says, "If all automobiles were put end to end around the world, they would go around the world so many times," the sort of data we see every day. I think this material rises to no higher dignity than that.

[fol. 3357] They say a can company may use so many tons of steel. If they had used it in such and such a way it would have been enough to have made so many cans. I think examination of the material itself which has been offered here indicates that that is all it is.

The witness then, taking this material, created by himself a conversion factor. Bear in mind, Mr. Finn testified that he was not a statistician. He used a method which he admitted the Can Manufacturers Institute had never used; that he has never seen anybody else use; and not being a statistician he was not in a position to defend the statistical validity of it.

I say the method he used is completely indefensible. On examination it will prove to be an average of an average, which no statistician worthy of the name would use for any purpose.

He also testified that he had never been able to find in this material or elsewhere any method of computing the [fol. 3357a] number of units manufactured by Continental or can manufacturers. It is no argument, no worthy argument, to say that this was the best he could do. If it is no good, the best that a man can do is still worthless.

[fol. 3358] This material is presented with the obvious intention that it should be relied on by the Court, and it is intended that these percentages should be used. They would like your Honor to prepare an opinion that uses this material.

Your Honor would find that if you did that, you would be relying on material which is computed in an indefensible manner.

The witness—I withdraw that.

The government also has admitted that it has no way of evaluating the Can Manufacturers Institute's data or the methods of computation. With respect to that, I turn to sections 1 and 2 of the chart book, Exhibit 800 for identification.

The Court: 800. This is the chart—

Mr. Johnson: This is the chart book. These are charts, and as such they were prepared for the purpose of creating impressions and for that reason they are particularly susceptible to being misleading.

They are misleading, first, because of the use of the lead-

ing company concept. They are also misleading in the technique of adding together the percentages of several unrelated companies. This has to do, apparently, with something that the government is fond of calling oligopoly, a term which sounds very bad but which I have never been quite able to understand.

Why there should be any relevance in a lawsuit to the fact that two unrelated, vigorously competing companies should together have such-and-such a percentage of the market I don't know. I am not able to follow the theory of the concept involved, unless there is some kind of an implication that somehow the companies are acting in concert. That implication is clearly without any foundation in this litigation.

The Court: Well, there has been no showing in any part of the government's case, it is quite clear, that anybody here is acting in concert. That is, when I say "anybody here," any of the various companies in any of the industries are acting concert. At this point you don't make any such claim.

[fol. 3360] Mr. McManus: I do not, your Honor.

The Court: Very good.

Mr. Johnson: In connection with this group of tables, I also go back to the one remaining table in folder C, Exhibit 803 for identification, and refer to table 1C, the first table in this exhibit.

Here, again, the leading-company concept has been used without foundation, and the table also divides up the metal container industry and tries to separate out from consideration some of the most effective competition in that industry.

The Court: You are talking about the captive companies?

Mr. Johnson: Yes, sir.

I then turn to section 4 of the chart book, Exhibit 800 for identification.

The Court: All right, sir.

Mr. Johnson: In so far as the metal container line on these charts is concerned, it is also based on the hypothetical figures of Can Manufacturers Institute, but in this case, for [fol. 3361] reasons unknown to me, and unexplained by the witness, they have seen fit to use a different set of hypothetical figures, this time taking the—

The Court: This time because they used No. 2 cans instead of actual cans.

Mr. Johnson: They used the hypothesis that all steel used by can companies was made into No. 2 cans.

The witness also testified, your Honor will recall, that the figures would be different, that the lines would be different if they started from a different starting date.

Since 1939 has no meaning as far as I know in this litigation, the other end of the line has no meaning either. One could get lines to go in almost any way they like in a project of this type, depending on the starting point.

The Court: All right, sir.

Mr. Johnson: I go then to section 6 of the chart, Exhibit 800 for identification.

The Court: This is the common-customer sales.

[fol. 3362] Mr. Johnson: Government counsel should have known, even if the witness didn't, the difference between an answer to an interrogatory and a document produced on motion to produce. The indication here is that this material was taken in answer to an interrogatory, which is not true.

The interrogatory, of course, is a sworn answer. A document produced on a motion to produce—

The Court: You don't have to explain that.

Mr. Johnson: However, the cross examination indicated how these tables were constructed and they indicate how absolutely devoid of meaning they are.

The Court: Incidentally, was this basic document offered in evidence?

Mr. McManus: It was marked for identification by the defendants, your Honor.

Mr. Johnson: That is correct. It has not been offered.

The Court: The government does not intend to offer that? [fol. 3363] Mr. McManus: Your Honor, I will tell you: I overlooked that. I really did intend to offer it.

The Court: It seems to me quite obvious that without that basic document these tables aren't worth anything.

Mr. McManus: At the present time it has a government's exhibit number.

The Court: I am not calling upon the defendants to offer that.

Mr. McManus: I understand that, but if, at the conclusion of that, I ask for permission to offer it—

Mr. Johnson: If offered, I have several other objections to make.

The Court: You might as well offer that. While discussing the common-customer tables, you better discuss table 2, because they go together.

What is the number of that exhibit?

The Clerk: Defendants' Exhibit ~~AA~~ for identification, [fol. 3364] your Honor.

Mr. McManus: We would like to give it a government's number, the next one.

(Government's Exhibit 1206 marked for identification.)

Mr. McManus: The government would like to offer, in addition, Government's Exhibit 1206 for identification.

Mr. Johnson: Going on, then, to the tables, the Court will recall that in the tables or charts, millions of dollars of sales were included in these tables as common sales, simply as sales of a thousand dollars or less by the other division of Continental, and these tables are probative of nothing.

In respect to the underlying material offered by the government, no adequate foundation of any kind has been laid for the receipt of this material. There is no indication of where it comes from, how it was prepared, what it was used for. It is just a document picked up with thousands of other documents pursuant to a motion to produce. There [fol. 3365] is no reason for accepting this document just returned-up in the welter of all other documents. It is full of irrelevant material, material having no relation to this litigation whatsoever, and I very strenuously object to its admission.

This document, amongst other things, has been in the hands of the government for many months. It has never been marked for identification, has never been referred to in pretrial.

I turn, then, to section 7 of the book of charts, Exhibit 800 for identification. This is the material, the Court will recall, taken from Internal Revenue statistics.

Cross examination made it clear that part of this ma-

terial is based on count and part of it is based on sampling technique. It is completely misleading.

The Court will also recall what the results would have been if this material had been extended for another year. It is a case where the government apparently has offered [fol. 3366] this material to show what it calls concentration in the industry; and, incidentally, the industry here referred to is a different one than they have referred to elsewhere, but it proves no such thing. This is an example of the government's omission to state material facts necessary to make the facts stated not misleading. The government should have known if it did not what the results of adding 1957 in this material would be. They did not see fit to do so. They intended not to disclose that to the Court.

The chart under section 8—

The Court: That is prior acquisitions, and we will take that up when we discuss prior acquisitions.

Mr. Johnson: Yes, sir. It will be treated under prior acquisitions.

I don't know if I addressed myself particularly to Government's Exhibit 1202, which was the CMI booklet for which, again, the government has made no attempt to lay a foundation, notwithstanding that they had a representative [fol. 3367] of the CMI on the stand at a time when these tables had already been prepared.

Their remains, your Honor, the plastic tables and charts, which were included in Exhibit 809 for identification, and I am sure the Court retains a vivid recollection of those charts and the machinery of their preparation. They are utterly fantastic charts. They are based on nothing; they prove nothing.

Those, sir, are my objections to this material.

The Court: Well, I think we will take a recess before I hear Mr. McManus.

(Short recess.)

[fol. 3368] The Court: All right, Mr. McManus.

Mr. McManus: Your Honor, Mr. Johnson skipped around considerably, so there might be pauses as I try to work back and forth. But I will try to make them as brief as possible.

The Court: All right.

ARGUMENT OF MR. McMANUS

Mr. McManus: I would like to say first, your Honor, that the government made no attempt to make these figures other than what they are, and in fact, if we erred, we erred on the side of being conservative and against our own percentage figures. By that I might say, as I pointed out before, Mr. Johnson mentioned the Hawaiian production. We took out only American Can's Hawaiian production, on which we happen to have statistics. We left in the Hawaiian production of one or two of the plants out there of a company, on which we are not able to get information. By leaving that information in, that made the overall statistics higher, and consequently, Continental Can, who does not produce out there, it made their statistics lower.

[fol. 3369] The same thing, I might add, we did, your Honor, in regard to glass containers in some of these charts. We knew that Hazel-Atlas did not make milk bottles. It was quite obvious to everyone from the beginning they did not. However, we left the milk bottle statistics in, which as a result would make the overall statistical data larger, overall national figures larger, and Hazel's participation smaller. There is no secret about it. We pointed it out clearly on the charts.

Now, we did not include plastic tops. We will argue that they are not in our line of commerce.

We also would like to point out, your Honor, that there was no secret about that. We pointed out to the defendants what we included or excluded. If it was not clear on the table, it was abundantly clear to the defendants, because their statisticians came down to Washington about May of this year, and our people took them by the hand, table by table, and informed them of all the underlying data, and [fol. 3370] furnished them the underlying data where it was needed.

Now, we have not offered here, your Honor, every piece of underlying data, largely because we did not want to clutter the record any more than we already have.

In the case of sales to key customers and suppliers, we have now made an offer, and before the conclusion of my little discussion here I think perhaps it might be better to make an offer of the underlying data from Internal Reve-

nue Service, which I will probably do and explain why as I go along through my presentation.

If we could now refer to Tables 3C and 4C in Folder C, Government's Exhibit 803 for identification.

The Court: Yes.

Well, now, what do you say your line of commerce is?

Mr. McManus: Well, we say, your Honor, that the proper line of commerce is tin mill products, metal caps, which would include the caps, vacuum and non-vacuum, screw, [fol. 3371] thread and lug type in the categories that we have set out.

The Court: You say, for instance, that cans made of plastic—

Mr. McManus: Would not be in our line of commerce.

The Court: Cans made of aluminum?

Mr. McManus: Would not be in our line of commerce.

The Court: Now how does that square with—

Mr. McManus: Your Honor, I would like to—

The Court: I will hear you on this, but I am very puzzled by this point.

Mr. McManus: Could I say this at this time? These charts do more than just the line of commerce argument, insofar as competition between whether aluminum and plastic or plastic and metal compete. These charts, 3C and 4C, also show what we would argue are full line argument. 3C, for example, shows the percentage of metal caps that— [fol. 3372] of the metal cap line that we argue, the percentage they have of metal caps, that they have both in units and percentages, and in 4C it shows the percentage of vacuum type caps, which you will notice is up in the 60 per cent.

And, as we have had testimony here, these vacuum caps are used only in the food field. We intend to show, as we have argued here before—

The Court: Now, look, let's get to 4. We are going along too fast.

Mr. McManus: 4C; your Honor?

The Court: Yes, I am looking at 4C.

Mr. McManus: The White Cap Company, the percentage of U.S. total for 1958 in production, was 61 per cent, and in shipments was 60.6 per cent. Now that is the vacuum closures, your Honor, and we have had testimony in the record

that the vacuum closure is only used for food, and we intend to argue that this Hazel-Atlas acquisition is bad because Continental Can now has the White Cap machinery that we have talked about, the witnesses have talked about; they [fol. 3373] have 60 per cent production at the present time at least, or at least at the time in 1958, of all vacuum caps sold. They now furnish the glass containers, where the finish has to fit the cap perfectly, and also they have the facilities to furnish the paper board container, the corrugated shipping container, and it gives them a complete package, the shipping container. The testimony that we have is that it represented anywhere from 15 to 25 per cent of the cost of the ultimate container.

So this chart on 4C not only shows that, we would argue, competition between the 60 per cent of White Cap in the vacuum, but also in the screw, thread and lug type, which Hazel had 4 per cent. We are arguing that those two are properly in the same line.

The Court: 4 per cent of the metal.

Mr. McManus: Yes, sir.

The Court: There is nothing to show here what percentage they had of—

Mr. McManus: Plastic and aluminum; that is correct, [fol. 3374] your Honor.

So as I say, if you should feel that these charts were—well, we feel that this is a proper line, but even if you should decide that our metal closure line was not proper, these charts should go in to show the effect of the acquisition of Hazel-Atlas in being able to furnish this full line. So they should go in, on our argument, for two purposes—one, for our line of commerce argument, the elimination of competitors in the metal cap field, but also the full line argument, that I have indicated here before.

Now going to 2C, if I may, your Honor, we have never argued that Crown caps were in competition with screw caps or with vacuum closures. We have never argued that. In fact, I think we have said explicitly that although there may be occasional exchange, or used to be, or maybe still is, of Welch's grape juice, we do not think that they both should be put in the same line.

Now Mr. Johnson accused us that we intended to indicate [fol. 3375] that by these figures their company, their client,

Continental Can Company, was the largest producer of Crown caps in the United States. We have no such intention. It is quite obvious they are not. It is well known throughout the industry, and right even in their own report, which we are offering, their annual report, they state they are second. It is no secret that Crown Cork and Seal Company is a larger company. They are second. We do not have the statistics on the size of Crown Cork and Seal. We do know they are bigger, and if you would like me to give you the estimate that I believe they are in size, I will be glad to do it.

The Court: What do you say they are in size?

Mr. McManus: I would say, your Honor, that they are probably in the 40 or 45 per cent bracket.

We argue, your Honor, that this also goes in for our full line argument. Here you have the same type of situation. You have the crowns, you have the bottles, and you have [fol. 3376] the corrugated shipping container. Also, although I don't want to get into the acquisition argument, they gained this position; we are going to show through our documents, and we are going to argue they gained this position largely through acquisition of companies that were in this field.

The Court: All right. Now I think Mr. Johnson then went to 5C.

Mr. McManus: Well, your Honor, he went first to the chart, IX. I want to see if there is any difference that I might have to comment on as to that.

The Court: Yes. I don't think there is anything to be added much.

Mr. McManus: No, sir, your Honor.

The Court: In other words, if the tabulation is in, the chart is in, and if the tabulation is out, the chart is out.

Mr. McManus: I would think that would be correct.

I would not prefer to argue on 5C, 803—

[fol. 3377] The Court: I am going to exclude 5C. I see no foundation whatsoever for 5C.

Mr. McManus: I see.

The Court: So that with respect to 5C, the objection is sustained.

Mr. McManus: Your Honor, we now go to table—

The Court: The next thing is 5D.

Mr. McManus: —5D, that is correct, in folder C, Government's Exhibit 803.

Now, your Honor, I would like first to direct your attention to the number of companies in operation on January 31, 1960, that column, the right-hand column.

The Court: Yes.

Mr. McManus: We of course argue that the whole chart should go in, and although there might be some errors, that this is the best information available, showing the change from 1920 to 1960.

But directing our attention specifically to 1960, we believe here that it is clear; that it shows the number of companies [fol. 3378] operating plants in the United States, and that any caveats or changes are listed on the attached page, the second attached page.

The Court: Well, I am going to exclude 5D in total. I think that is a very misleading chart. There has been no proper foundation laid for it, in my judgment, at all, so I am excluding 5D.

That means, for the record, that as far as folder C, which is Government's 803 for identification, 5C and 5D of that folder, the objection is sustained and 5C and 5D will be excluded.

I may say that the fact that I am passing these other things without ruling on them does not indicate that I am either excluding them at this point or letting them in.

Mr. McManus: I understand that, your Honor.

The Court: I will come back and make rulings on these when you have completed your argument on these others, [fol. 3379] except for those which I specifically ruled out.

Mr. McManus: I understand, your Honor.

Now, referring to Government's Exhibit 801, which is folder A, and Mr. Johnson, I think, referred specifically to the chart, 1A—

The Court: Well, these are the glass, aren't they?

Mr. McManus: Yes, your Honor.

The Court: With respect to the objections on glass, that is, 801, Section I, 802, Sections V and VI, the objection is overruled and those will be admitted.

Mr. McManus: All right, your Honor.

The Court: I may say that because I admit a chart is no indication of the weight that is to be given to it. The ques-

tion of weight is entirely another matter, and a chart may go in, and I may give it little, if any weight.

Mr. McManus: I understand.

Your Honor, before we leave, although you are admitting those, could I just make one little statement at this point? [fol. 3380] One of the arguments was made that Armstrong and Wheaton were not excluded. I would like to refer to the fact, your Honor, that practically every glass container manufacturer that testified here was asked who were the leading companies in the field, and they listed up to the first four or five, and in each one of those Armstrong and Wheaton were never mentioned.

Mr. Hughes: Your Honor, just so we are clear, do I understand that your Honor has received all of the tables in Section I, folder A?

The Court: Yes, all of the tables in Section I, folder A, that is Exhibit 801, and all of the tables in Sections V and VI, of 802, which were treated as a group by Mr. Johnson.

Mr. Hughes: Thank you.

Mr. McManus: Now, your Honor, Mr. Johnson then referred to tables and charts that contain unit figures, and that was 2 and 3 of folder A, one, two, three, four and seven of folder B.

[fol. 3381] Mr. Handler: Repeat that, Mr. McManus.

Mr. McManus: My understanding was that Mr. Johnson referred to unit figures in charts, Sections II and III of folder A.

The Court: Which is 801.

Mr. McManus: Excuse me, yes, sir, which is 801, and to Sections I, II, III, IV and VII of folder B, which is 802.

The Court: I, II, III, IV and VII, my notes indicate.

Mr. Johnson: And also that portion of Section III.

The Court: Yes, the charts in Exhibit 800, which use unit figures.

Mr. Johnson: Yes, sir.

The Court: Now in connection with your discussion here, Mr. McManus, you may as well address yourself also to Exhibit 1202.

Mr. McManus: Yes.

Your Honor, I think there is not much need, although we referred to those, to be specific about any chart, because

[fol. 3382] basically the system arrived at or the methodology used was pretty much comparable in each one, as I recall.

I would like to say this, your Honor, that CMI, Can Manufacturers Institute, which published this data, of course, represents the can manufacturers, of which the defendant here is one of the principal members, and has been for a number of years.

The Court: What do you mean by "represents the can manufacturers"?

Mr. McManus: Well, it is a trade association, your Honor, which is composed, perhaps I'd better say, of the leading can manufacturers, as we have had testimony here. We have had testimony that American, Continental, National and several others, a number of other companies, belong to that association.

The Court: Do you think that this defendant is bound by what the Can Manufacturers Institute says?

Mr. McManus: Let me say this, if I may, your Honor [fol. 3383] I would say this—if I may comment, I would like to answer that in just a moment—this association is a somewhat different type of association than most of the trade associations that I have seen, and we have testimony here by the third largest manufacturer of cans, the president of that company, who is also an officer in that corporation. This corporation is not run by everyone getting one vote in deciding how this operation, this company, this association is operating. The larger companies get more votes and the middle companies get lesser and the smaller companies even get lesser.

Now, American, as I recall, and Continental fell into that upper bracket. I am not sure if National did. I think they did not, but they fell at least in the middle, and then the lower.

Now, a lot of work goes into the making up of this statistical data. They have a staff. It is quite obvious it is an expensive operation. They make up this publication, and there is testimony that they distribute it to their members. [fol. 3384] They have been doing this for years. That publication carries back over a number of years. It is our belief that it is relied upon by the industry, and I think you can conclude that if they didn't consider that this was the proper way of doing this, at least to give them some idea

of the number of cans made, they would long since have discontinued doing it and would long since have spent all the money gathering all this data and distributing to themselves and other members of the industry.

The Court: Now, what testimony is there in the record to lay, as you say, a foundation for 1202 for identification?

Mr. McManus: Well, your Honor—

The Court: Apart from the general testimony as to what Can Manufacturers Institute does generally? Is there anything in the record with respect to this document and how it was made up and by whom, and under what circumstances?

Mr. Handler: Which one is 1202?

The Court: It is the annual report of steel and tin containers [fol. 3385] summed in metal cans, Can Manufacturers Institute.

Mr. McManus: Your Honor, our argument would be that this is a business organization. They surely would not make up this type of data and distribute it to themselves if they thought there was no sound basis for doing this. There is no question but that this is a document which was put out by CMI. We did not put a man on the stand to—

The Court: You had the CMI fellow here, and you didn't ask him about this.

Mr. McManus: No, sir, your Honor, we did not. We think it is quite obvious that it is a—we are not arguing that this is not an estimate, your Honor. We are not arguing that. It says so right on the pages themselves.

The Court: Well, where does the data that is in here come from?

Mr. McManus: Well, the data that they use is the census data, and they in turn convert that into units for these various groupings. Now, the basic data, there is no question about.

[fol. 3386] The Court: The basic data is identical with the census data, and I think there is testimony in the record to that effect.

Mr. McManus: That is correct, your Honor. So all they have done here, these people, these members, these large members, all they have done is, they have used some system to convert that into this type of statistical unit. If they did not think it was a good estimate or fairly accurate estimate,

it would seem to me that they would not have spent all this money over the number of years, and they have been doing it for a considerable number of years on the No. 2 can basis, and they apparently think they have improved on it, because lately they have not only been doing it on the No. 2 cans for food, but they have added that actual category that we have been talking about, actual number of cans.

The Court: What do you think the phrase "might have been made" or "might have been produced" means?

Mr. McManus: Your Honor, I think it is an estimate. [fol. 3387] Your Honor, I think it is an estimate by a trade association that represents by far, by far, most of the can manufacturers in the United States. They surely would have more know-how, those members, in how to estimate the percentage, the percentage of cans that went into these various units, than anyone that I can possibly think of.

We are not asking you to take this on the basis that there isn't other ways of coming to this conclusion, or we are not asking you to consider that there were that number of cans actually made. It might vary a percentage or two or three or four. But we say that this is the estimate used by this very defendant's own trade association, of which they are one of the principal members and one of the highest voting members, or at least have more votes than anyone else except American Can and possibly Continental. They published this for years, and they continue to publish it.

We argue, your Honor, that that is the best unit information that is possible to get at this time. No one in the industry that I know of, I will agree, works on a unit basis. Census does it on base boxes of steel consumed; then converts it into tons. This association, of which the defendant is a principal member, decided to do it this way, and we agree with them, we think that this is a good estimate.

[fol. 3388] The Court: All right. So much for that.

Now, next the charts in sections 1 and 2. Well, I don't think the charts in sections 1 and 2, which are the—they are the glass charts, aren't they?

Mr. McManus: Yes, your Honor.

Mr. Johnson: Section 2 is metal containers.

The Court: Section 2—that is short tons, all of it, isn't it?

Mr. McManus: Yes, your Honor.

The Court: It doesn't need a conversion factor.

All right. I will overrule the objection as to charts 1 and 2, Exhibit 800, and they will be admitted.

(Charts 1 and 2 of Government's Exhibit G-800 for identification received in evidence.)

The Court: I will review these again, so we will have a complete set of rulings here on all these charts.

[fol. 3389] Mr. McManus: Then, your Honor, going to 800, section 4—

The Court: Now, wait a minute, 1C. 803, 1C.

Mr. McManus: Excuse me, 803, 1C.

The Court: 803, 1C, is the next thing that Mr. Johnson read.

Mr. McManus: Yes, your Honor.

The Court: That is on the theory that the captive companies are not in there.

Mr. McManus: Yes, your Honor. We offer this—

The Court: Now, tell me why you think the captive companies ought to be excluded.

Mr. McManus: The reason I think that, your Honor, is that these captive companies are not offering their cans for sale. It is our contention that you take a company like Campbell's Soup Company, which is a large manufacturer of soup cans, they are selling—

The Court: Are there any figures anywhere in the record on Campbell's Soup Company can manufacture?

[fol. 3390] Mr. McManus: No, your Honor. They don't give out those figures, and the Census does not publish them. There are other captive plants, and they lump them all together.

The Court: Is theirs a total figure for captive companies in the census?

Mr. McManus: The way they do it theirs is not. But you can take the figures of all can manufacturing plants and subtract the figure of captive plants manufacturing cans in the United States that we have in 1C.

The Court: You haven't put in the record anywhere what the total figure, including captive plants, would be.

Mr. McManus: Your Honor, may I have just a moment. I think it is in this chart. Could I check?

The Court: Let me see. I don't have it.

Is this shipments by manufacturers for their own use?
Is that supposed to be captive plants?

[fol. 3391] Mr. McManus: That's correct, your Honor. I would like to correct my statement. Mr. Finn just indicated to me. Take 1957, where it indicates that in the continental United States there were 4,566,616 short tons of steel consumed. That would include for own use and for sale. Then we go down where it says "less shipments by manufacturers for own use," which is 632,859 short tons.

The Court: And then you take that as 100 per cent and take percentages of that?

Mr. McManus: Of the 3,923,757 short tons.

Now, I would like to point out, your Honor, that again we took a conservative approach, we believe, to all of our charts. This chart is the only one that is based on figures which exclude captive plants. All of the other data include captive plants, although we argue they are not in competition with Continental Can Company when they are selling their cans to themselves.

The Court: All right.

[fol. 3392] Mr. McManus: Now, we would argue, your Honor, that this would show—this is a concentration figure of companies which offer cans for sale. In other words, in this chart we argue, your Honor, that Continental's percentage has increased so that they are now up to 37.2. American also increased to 45.2.

The Court: All right.

Mr. McManus: But I would like to make it clear that all the other charts are not based on captive plant data, although we do believe that this is probably somewhat more realistic in that the other companies do not offer their cans for sale.

I would like to add also that this is based on census data.

The Court: Next is chart—section 4 of the charts, supposedly historical growth.

Starting off with this, I have no idea what this chart is supposed to prove or the purpose of it. It hasn't been made clear to me what, if anything, it does prove.

Mr. McManus: Maybe I should start with that, your [fol. 3393] Honor.

The chart in section 4 of Government's Exhibit 800, page

68, is entitled "Historical Growth of Metal and Glass Container Shipments Expressed as Index Numbers and Shown as a Trend."

Now, we start out with 1939 from the base of 100, and with this—what this chart is—

The Court: What has 1939 got to do with the present lawsuit?

Mr. McManus: Your Honor, it was the period just—I mean, it was the period further on—

The Court: It seems to me that, if anything, 1939 was a very curious year to choose because immediately thereafter we went into the war and the whole canning industry was adversely and abnormally affected by the shortage of metal.

Mr. McManus: That's correct, your Honor. We used this figure because this was the data the furthest back that we had. I believe that is the testimony.

Now, your Honor, the purpose of this chart is to show—
[fol. 3394] The Court: If, for instance, you used 1948, let's say, or 1946 as a starting point, your trends would be entirely different, wouldn't they?

Mr. McManus: I thought they would not.

The Court: I thought the witness told me, when I showed him this corner of the chart, that the trend would be quite different if you started off with 1946, let's say, as 100.

Mr. McManus: Well, what he was saying, your Honor, I believe, is that they would not be identical with this chart. That would be absolutely correct. But if you are talking about the trend, we are trying to show here that glass containers percentagewise, their shipments are increasing faster than metal cans. That's the purpose of this chart.

You would not come out with the same, exact figures, but I believe that if you or the defendants want to make up a chart that starts in 1948, the results would be entirely the same.

Now, whether the line would hit 282, or whatever it is, [fol. 3395] and the other one hit 24, I am sure it wouldn't, but there would be a spread, and the glass containers, their percentage would increase faster than that of metal cans. That is our firm belief.

Now, we do the same thing, your Honor, on page 70, which is the historical growth of metal and glass container ship-

ments expressed as index numbers and shown as a trend, and we do this, your Honor, for food containers.

The only purpose of this chart is to show that in the food field, glass containers have increased percentagewise much more rapidly than metal cans.

The Court: What do you say is the significance of that?

Mr. McManus: Well, your Honor, we aren't going to argue that there are not more metal cans sold for food than there are glass. It is quite obvious that they are. But it is our position to argue that the glass has been growing at an accelerated rate and as such is making inroads more [fol. 3396] rapidly into the food field than the metal cans percentagewise.

The Court: All right.

Now, we come next, if I understand it, to section 6 common-customer sale.

Mr. McManus: Now, I would like to say something about that, your Honor—

The Court: This is a bad one, in my opinion.

Mr. McManus: All right.

The Court: This is a very bad one.

Mr. McManus: For my side or the other side?

The Court: For your side. It is a very poor and misleading chart, to my mind. Unless you can convince me to the contrary, you can now argue with respect to 1206, but as far as these charts or any expression of what is in 1206, I have no confidence in them whatever, and I am going to exclude the chart.

Mr. McManus: I see. Your Honor, then directing my attention to Government's Exhibit—

[fol. 3397] The Court: You can argue 1206 now.

So that the record may be plain, Section 6 of Exhibit 800 are all excluded.

Mr. McManus: Your Honor, directing myself now to Government's Exhibit 1206, I would like to state a few things about this document which I think—where inferences, I think, may have improperly been made. We did say, your Honor, and it was an oversight and I take the responsibility, that it was an answer to an interrogatory. It wasn't. It was an answer to a government motion to produce.

The Court: What did you call for on the motion to produce?

Mr. McManus: In general, the names of customers and what they produced.

The Court: That was your request, relating generally to that?

Mr. McManus: Yes.

Now, the request was much broader than this document, no question about that. Or at least in my opinion it was, [fol. 3398] and I believe in the defendant's opinion.

As you recall, in trying to settle our differences over the requests of the government, we sat down in chambers and we tried to work out our differences as far as possible. This chart—or, excuse me, this table here, "Sales to Key Customers and Suppliers," was not included, as Mr. Johnson would like you to believe, in a group of a whole mass of documents which they turned over to the government. No, no, sir, it wasn't. This document, your Honor, was held back and handed personally to me by Mr. Johnson, and the reason he did that is because he says, "This information is highly confidential. I do not want it in the files of the Department of Justice just for anyone to read. This is a highly classified document," and as such I believe that Continental Can relies on it.

It says—

The Court: All right. I am familiar with it. I think that is enough of that. I get your position on that.

[fol. 3399] Mr. McManus: Of course, your Honor, we were referring to the first page, as to how the document is made up. That would be part of the basis of our offer, that it was made by the sales control document, and the first page indicates that it was so compiled.

The Court: Yes.

Now, next is section 7, and this time you have really got me. Section 7 of Exhibit 800.

Now, the very title of this table, to my mind, demonstrates that it is irrelevant. I am not going to fake tables about tin can and other tinware industry in this case, and I am not going to take tables that are predicated on tin can and other tinware industry.

We are dealing with the container industry. If you have got figures about containers, I am willing to consider it.

but I am not willing to consider stuff of this nature, and I am going to exclude both of these.

[fol. 3400] Mr. McManus: Your Honor, before you do, may I make one short argument to explain the basis of these things and why we think you should take them in?

The Court: All right.

Mr. McManus: Our basic purpose is this, your Honor. This is for the purpose—excuse me. First, I would like to identify the documents that we are referring to as Government's Exhibit 800, and they are the charts in section 7 "Tin Can and Other Tinware."

Now, the only purpose—first, I would like to say, your Honor, we admit and the statistician has already testified; that this includes not only the tin can industry but also people that make tinware, and the only purpose of this chart is to show that in this industry, which includes additional people, the tinware people, that the American Can and Continental Can have for years, from 1946 through 1956, had by far the great bulk of the sales and by far the highest number of assets. They have been the dominating companies. [fol. 3401] It only goes in for that purpose. It is a category which has been set up by Internal Revenue Service, and it includes a little more than the tin can industry. But even including other industries, Continental and American predominate, and we say that you should take it to show that even though we have expanded the overall universe, they are still the dominant companies.

Now, I would like to point out one other thing—

The Court: What about this argument by Mr. Johnson as to the omission of 1957?

Mr. McManus: I was just going into that, your Honor, and I would like to direct my argument to that, because Mr. Johnson has accused us of being misleading a number of times here, and I want to say that Mr. Johnson is misleading the Court, perhaps not intentionally, but the document he showed Mr. Tolton is not the document on which we based our statistics. This is put out by the Internal Revenue Service, and it gathers information, this document, for [fol. 3402] scholars and people that are interested in tax and things of that nature, and it gathers data and puts it in here.

They refer to the actual studies that were made that we

have here, that they might occasionally use that as a source, or they may sometimes use that as a source. But they will use other stuff. They use Census and other things of that nature. We rely upon this—

The Court: What is that that you hold in your hand?

Mr. McManus: This is a study made by the Internal Revenue Service from the income tax returns—from the income tax returns of the various companies.

The Court: Has the other side seen that?

Mr. McManus: Yes, your Honor, they have. They have had copies of this for a number of months. Since last May, I believe.

The Court: And what is that entitled, that document that you hold in your hand?

Mr. McManus: This is from the source books of statistics [fol. 3403] of income. This is the statistics of income. This is put out, I believe, annually—annually. This is never put out until about three years after the material has been gathered. That is the only reason we had up through 1956.

There are other sources that this document relies on, and they can do it annually and they can make guesstimates out of it, but this is the reliable source information for the data which we have and what we plot our chart on. We start out with this basic data and finish with this basic data. If we had finished with this, we would come out with some other conclusion. But this is the basic data. We don't start out with this and finish with other documents which we don't consider to be accurate.

The Court: Are you going to offer that?

Mr. McManus: Your Honor, I was going to say that to be abundantly clear, we should show it to the defendants and [fol. 3404] give it a government's exhibit number. This has the usual seals, etc., of the Treasury Department confirming that it was so made by them.

(Government's Exhibit 1207 marked for identification.)

Mr. McManus: The government would also like to offer Government's Exhibit 1207 for identification. We would like to offer that into evidence.

The Court: Let me see 1207.

Mr. McManus: In addition to this—

The Court: Just a moment.

Is there anything in this material here that defines what tin cans and other tinware is?

Mr. McManus: Your Honor, we have a—I mean, Mr. Tolton read, I believe, from a different classification index which we could put in, if you thought—

The Court: Mr. Tolton read from it. What was the definition? Do you recall it?

Mr. McManus: Could I have him answer that, your Honor?

[fol. 3405] Could you indicate what that was, the definition of tin cans and other tinware?

Mr. Tolton: I read from the Internal Revenue Service document which defines the tin can and other tinware industry, and then it went into detail—

The Court: Where is that?

Mr. Tolton: I have it right here.

The Court: Let me see it.

Mr. McManus: Your Honor, while he is getting that, could I point out one other thing that shows that the statistics we compile would be somewhat different from what Mr. Johnson offers out of his book, and I will tell you why.

As the witness testified, our statistics refer to companies whose primary operation is the manufacture of tin cans and tinware. This could include captive plants whose primary operation could be paints, such as Sherwin-Williams. So that is the reason our figures would refer only to companies whose primary operation is the manufacture of cans.

[fol. 3406] Now, this could include companies whose operation is not that, but who incidentally might make cans for their own use or for other purposes.

The Court: That doesn't help us very much, Mr. McManus. Tin cans: beer, oil, milk, ice cream and other general lines. Tinware and household utensils.

That doesn't help me. It doesn't give me any really fair idea of what the industry is.

Mr. McManus: Well, your Honor, it would be our position that this chart would include the tin can industry, by that definition, and it would probably include other tin manufacturers.

The Court: I don't know, for instance, whether it includes frozen foods or not. For instance, the little cans that frozen orange juice comes in. Do you think that—

Mr. McManus: Oh, I most assuredly believe that it does, because that is a tin can. It would include any tin can.
[fol. 3407] The Court: All right, Mr. Johnson, I will hear you.

Mr. Johnson: I asked the witness that question, and he said he did not know.

Mr. McManus: And I think you asked me if I did, and I thought it does.

The Court: Well, that is a matter of opinion.

Mr. McManus: At any rate, your Honor, it includes the tin can and tinware industry. It includes more than our line of commerce, and I am willing to concede that that is quite obvious that it does. But what it includes in addition to tin can, it obviously, I think, includes all the tin can companies who make cans for sale, their primary operation. It includes some people who make tinware products which are not tin cans.

The Court: Is there any indication in the record, for instance, what proportion of American Can's production goes into tin cans? For all that appears in the record, 10 per cent of their production might go into tin cans, and 90 [fol. 3408] per cent into other tinware.

Mr. McManus: Well, your Honor, there is no question but that in our chart—if I understand you, in our chart there was no argument by Mr. Johnson that the two companies involved there were not American Can and Continental Can. He asked him questions about that himself.

The Court: Oh, I quite understand. That is why I am asking you about American Can.

Mr. McManus: Well, these are only—well, the asset figures, your Honor, of course—I will withdraw that.

Their sales figures, as I understand it, I believe the witness testified, referred only to their tin can production.

Mr. Handler: That is not so.

Mr. McManus: Isn't that true, or am I wrong? I am in error, your Honor. I will withdraw that. Excuse me, your Honor.

What he said, as I should have realized, is that that was their primary business, so obvious over 50 per cent of [fol. 3409] their sales, would have to be in cans or they would not be in that classification, and the same thing would be true of Continental. The same thing would be true of

any company on this list. Over half of their sales would have—their primary sales would have to be in tin cans or tinware.

The Court: Well, now, Continental is included in here.

Mr. McManus: Yes, your Honor.

The Court: I don't remember the figures, the Continental figures, but let's say 51 per cent of Continental's sales are in tin cans and 49 per cent are in other than tin cans, and let's suppose the same thing occurs in American Can.

Mr. McManus: Yes, sir.

The Court: That means if that were so—I don't know whether it is so or not—these charts would be completely misleading—

Mr. McManus: Well, all we are saying to show—

The Court: —in relation to the issues in this case.

[fol. 3410] Mr. McManus: Your Honor, I think what the charts show is in this whole industry, from 1946 on, both in sales and in assets, these two companies have been the dominant companies for that 20-year period, and I believe that they have expanded their share and some of the smaller companies have lost—

The Court: If I do let these in, I assure you the significance I attach to them is going to be minimal.

Is there anything else?

Mr. McManus: That is all I have to say on this group. If you would like us to go into plastics, Mr. Greenberg will—

The Court: I think I will take that after lunch.

Mr. Hughes: Your Honor, did you rule on 1207?

The Court: No, I haven't ruled on 1207, and I won't rule on 1207 until I hear from you gentlemen.

[fol. 3411] Mr. Greenberg: If the Court please before we recess for lunch I would appreciate one clarification. The only guidance I have from Mr. Johnson with respect to his objections to the plastic table are in essence that they are utterly fantastic and prove nothing. That really doesn't indicate to me what his objections are.

The Court: It indicates to me what his objections are, and I think it is your job to show that these charts have some validity and are admissible. That is your burden.

All right, gentlemen. We will take a recess until five minutes after 2.

(Recess taken to 2:05 p.m.)

[fol. 3412]

AFTERNOON SESSION

2:10 P.M.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Greenberg: If the Court please, I believe the order of business at this point is defendant's general objections to Government's Exhibit 809.

The Court: That's right.

Mr. Greenberg: Turning first, sir, to table 2, the dollar sales, the dollar sales of each of the seven firms included within this table have been the subject of a stipulation which has been marked Government's Exhibit 925. Within this table we seek to compare each company's dollar sales with two universes. These universes received definition and consent by the parties in response to his Honor's statements at pages 3,204 and 3,241 of the transcript of proceedings of October 14, 1960.

The reason for the two universes is that defense counsel agreed to use Mr. Schillaci's estimate of what Plax considered—

The Court: Now wait a minute, wait a minute. They [fol. 3413] didn't agree to use this. They agreed that if you took Mr. Schillaci's figures and had them projected, you would reach a certain result.

Mr. Greenberg: That is correct, your Honor.

The Court: All right.

Mr. Greenberg: I was about to add that in the next sentence.

The Court: All right, I'm sorry.

Mr. Greenberg: Continuing, your Honor, that line of thought, reference is made to page 2,511 of the proceedings of October 4, 1960, and to Mr. Schillaci's testimony of June 14, 1960, on page 178.

We believe, your Honor, that these tables are competent, relevant and material.

The Court: The first universe of 39,000 is what we will

call for want of a better word the Schillaci universe, and the 29,000 is what universe?

[fol. 3414] Mr. Greenberg: That is millions, your Honor.

The Court: What?

Mr. Greenberg: Millions, your Honor. Three zeros—

The Court: Yes, I know that, but what is the 29,000,000?

Mr. Greenberg: That is the range of from 30 to 40 per cent. In other words, one universe constitutes, after a projection, 30 per cent, or starts with the 30 per cent estimate, and the other one starts with the 40 per cent estimate.

The Court: In other words, that is, taking the range of Schillaci between 30 and 40 per cent, the 30 per cent is the 29,000,000 and the 40 per cent is the 39,000,000.

Mr. Greenberg: That is so, your Honor?

Tables 3 and 4 do not contain a universe figure. Table 3 contains the poundage figures for six firms and the dollar sales of one firm, all of which are covered by the stipulation G-925.

[fol. 3415] A group total is used instead of a universe to indicate relative rank in production among the leading companies.

The characterization of "leading companies" is based upon testimony already in the record, testimony which occurred during the month of June.

Table 4 has the same format as table 3, except that it makes its computations for both dollars and pounds.

We believe tables 3 and 4 are competent, relevant and material and should not be rejected by his Honor.

Table 1 seeks to compare the growth of five leading firms in the plastic container industry, and for Continental Can alone, and compares such growth with the expansion of the glass container and metal can industries. The data in this table is based upon census material and facts covered by the stipulation.

The Court: Well, my worry about table number 1, I am frank to say, Mr. Greenberg, is that it seems to compare [fol. 3416] different things. You have got plastic containers net sales by Continental Can compared to plastic bottles, jars and carboys with another five firms, apparently lifted more or less arbitrarily out of the industry, and then you compare that to metal cans and glass containers, and what

worries me is what is the significance of the plastic bottles, jars and carboys?

Mr. Greenberg: Your Honor, we think that the poundage rate of growth and the dollar sales rate of growth are related.

The Court: For instance, in 3, if this figure were plastic containers instead of plastic bottles, jars and carboys, you might get an entirely different figure of percentage increase. [fol. 3417] Mr. Greenberg: If the Court please, these figures are based on the matters covered by the stipulation. In 3 what we tried to do was to extract from the figures such things—

The Court: When I say 3, I am talking about line 3 of table 1.

Mr. Greenberg: That is what I am talking about.

The Court: All right. Go ahead.

Mr. Greenberg: With those poundage figures in line 3, we tried to extract from these figures that which was represented by Christmas ornaments, toy pigs and what have you, which represented a small percentage, a very small percentage of the production of these five leading companies. That is the reason why we call line 3, or entitle it "Plastic Bottles, Jars and Carboys." That is the only reason.

The Court: Is it your contention that line 3 represents thousands of pounds of polyethylene consumed by these five firms in the manufacture of all containers, plastic containers, manufactured by them?

Mr. Greenberg: No, your Honor. We are indicating that—this is what we are trying to show: We have taken five companies who we believe are leading companies in the field, and this is based upon testimony in the transcript. We wanted to show their growth, regardless of what the rest of the industry did, their growth, the growth of these leading companies, over a five-year period, because they are the ones—

The Court: Well, the only way you can show that in the container field is by including all the containers, the plastic containers, they manufactured.

Mr. Greenberg: Well, I think these are all the plastic containers they manufacture. They do not include containers such as toy pigs or the few other things—

The Court: I am not talking about toy pigs.

Mr. Greenberg: Your Honor, again I wish to reiterate, all this line 3 shows is the growth, perhaps in an important [fol. 3419] phase of these companies' business, their growth over a five-year period. We want to show—

The Court: You don't say, for instance—do you say that polystyrene is in competition with metal cans and glass containers?

Mr. Greenberg: No, your Honor, we do not. The testimony this far has indicated that competition has been in the high and low-density polyethylene fields. We do not deny that, for example, occasionally a company such as Prell will put out a polystyrene tube, and that was offered by Mr. Hughes a few days ago. But that is surely the exception, and we maintain that is so, and we believe the defendants cannot show that it is not the exception.

The Court: All right. Anything further on this, Mr. Greenberg?

Mr. Greenberg: No, your Honor.

The Court: Now, I will hear briefly from you, Mr. Johnson.

You may remember that 1207 for identification has been [fol. 3420] offered since I heard from you last time, and you might want to address yourself to that. That is the material from the Internal Revenue Service.

Mr. Johnson: Yes, sir.

Let me address myself first to the last subject, since it is now before us.

The more I hear about this group of documents, 809, the more confused I become as to what they are all about. The government seems somehow to be trying to get from us an agreement of what the plastic container industry is, or what the plastic container business is.

I have not tried to define it for the purpose of this case, and I don't think it is incumbent on me to do so.

With respect to what Mr. Schillaci said, it seems to me that really all I can say is that Mr. Schillaci said what Mr. Schillaci said, and it is in the record.

At this point we get all confused about whether we talking about Polyethylene, blow-mold, of polystyrene. I have [fol. 3421] just heard that polystyrene containers for some reason are apparently so different that they are not even closely related to the polyethylene bottles. I heard that with considerable surprise from the government.

With respect to what Mr. Schillaci said, about what this industry was, on page 178 of the transcript—

The Court: Just a minute. I will follow you as you go along. All right.

Mr. Greenberg: Could you wait just a moment until I get the page reference?

Mr. Johnson: Yes.

Mr. Greenberg: All right.

Mr. Johnson: On page 178, it is there that he says:

"... we do something in the order of between 30 and 40 per cent."

A few lines down, your Honor asked him:

"He is talking about the type of bottles we have been discussing here. Is that right?"

The witness says:

[fol. 3422] "Yes, sir."

On page 143 he says:

"We manufactured the bottles for use in the field, mostly from polyethylene but not limited to that. The plastic material that can be blown is used for selling the markets where special purposes are required or where a special function or purpose is needed."

On page 229, Mr. Greenberg asked, toward the bottom of the page—I am sorry—

Mr. Greenberg: I didn't.

The Court: It was Mr. Hughes.

Mr. Johnson: I am sorry. Mr. Hughes in cross examination asked him:

"... whether you"—referring to Plax—"make polyethylene bottles of low-density and high-density."

He said, "Yes, we do."

"Q. And that is the overwhelming highest percentage of the bottles you make, that is, made of either low or high density?"

The answer on page 230 is "Yes."

[fol. 3423] Then on pages 238 and 239, on cross examina-

tion, it was suggested to him that there might be as many as 200 companies in the industry. He says that wasn't the figure that he had in mind. "but I certainly would not say that it was out of line . . ."

The next page, 240, referring to these same small manufacturers, the Court asked him:

"What sort of volume would he produce in terms of dollar volume?"

He said:

"Couple thousand, three, four thousand dollars a week,"

and your Honor then translated that into, "Say, two hundred or \$250,000 a year maybe?"

He said, "Possibly."

And on the following page, he goes into the question of injection molding and makes an estimate as to the number of firms in the injection molding business.

So, your Honor, all I can say on that again is that Mr. Schillaci said that Mr. Schillaci said. I don't think I need [fol. 3424] spend any time on the rest of these tables in this group. They are just indicating how much a limited group of companies did, and to me this is nothing more than taking six delicatessen stores at random and adding up the total and then dividing as to what percentage of the six each of them sold.

Mr. Greenberg did comment on the leading companies, and he said that his concept of leading companies here was based on the record.

Again I point out, as I did in the cross examination, that somehow and mysteriously American Can Company has disappeared from this group. There is no reference to Olympic Plastics. In fact, there is no indication of what is meant by leading companies at all.

Going back, then, to the earlier material, Mr. McManus has said in a number of instances that this material was the best they could do and I simply point out again that if the material is no good in the first place, the best they can do is no good.

[fol. 3425] Mr. Greenberg: I would like a page reference to that.

The Court: What is that?

Mr. Greenberg: I would like a page reference to that?

The Court: To what?

Mr. Greenberg: To Mr. McManus' statement that this was the best they could do, or something like that.

The Court: Don't interrupt his argument. If you have anything to say, you can add it later.

Mr. Greenberg: I hesitated to argue, your Honor, and I don't normally do that, but I believe that remark is improper argument.

The Court: Go ahead, Mr. Johnson.

Mr. Johnson: Now, with respect to the chart that related, or the table, I believe, to captive manufacturers, Mr. McManus said they did not have any figures, and I think that with respect to your Honor's question about Campbell's Soup he merely said they did not have any figures.

[fol. 3426] The Court: As I understood it, he said he did not have any specific figures on specific companies. He pointed to a figure on one of the tables, six hundred million-odd, which he said indicated the number, that is the gross, of the so-called captive man manufacturers.

Mr. Johnson: That is correct. I simply wanted to comment that he did not have any American Can figures until such time as he chose to give them. The same figures were available with respect to the other companies as were available with respect to American.

This morning we have a new starter as an offer by the government. This is Government's Exhibit 1206, the so-called key customers. I indicated before this document has never been considered at all in pretrial discussions.

[fol. 3427] Mr. McManus indicated, I think the words he used were "this document had been held back and subjected to special treatment."

In the first place I think it should be clear, if it isn't already, that regardless of how this document was produced, it was not prepared for any purposes in this case. It was not prepared in response to either an interrogatory or prepared in response to a motion to produce.

The Court: You don't question that it came from your

files, or, I take it, that it was a report of your Sales Control Department, do you?

Mr. Johnson: I do not, sir, but it was not prepared in response to anything. We have no evidence with respect to it. There is no indication that it is an admission by the company. There is no indication of why it was prepared; no indication of the accuracy of the material. It doesn't even show what products were sold—simply lines that show metal containers or glass containers of the Hazel-Atlas Division. There has been no foundation of any kind whatsoever [fol. 3428] ever laid with respect to this document.

What is your Honor supposed to conclude it means? What do all of these figures stand for? What is the purpose of making the offer? I don't know. We are left in the dark completely with respect to that.

Mr. McManus made something about the manner in which this was produced. Of course it was produced very carefully, with all kind of references to confidentiality. This is a list full of customers' names. Instead of being held back in any way, shape or form, this document was discussed with the plaintiff at a time when we were trying to work out the scope of the motion to produce. Now suddenly we find this as a document which is to be offered for no one knows what purposes.

With respect to the Internal Revenue material, Mr. McManus said that in that instance when I questioned the witness I was actually talking about material other than that used. I presented that document that I used to the witness, after it had been marked for identification, and asked him [fol. 3429] on page 3300 of the transcript:

"Did you use this book in the preparation of your tables?"

The answer: "Well, ours was the original source book that was obtained from the Internal Revenue Service, that's right."

Mr. McManus makes a distinction without a difference. The documents, the charts, that he is referring to apparently were prepared from earlier versions of this material. The witness, however, had no difficulty whatsoever identifying with this material. In fact, the number of returns which

are referred to in cross-examination, number of 52 on line 122 of page 16, is exactly the number referred to for 1956 in the chart (showing to Court).

The Court: Yes.

Mr. Johnson: Some reference was made in Mr. McManus' argument as to the exclusion of plastic caps from one of the closure tables. I don't know whether plastic caps should or should not be included. My point there is simply that the [fol. 3430] government has picked out what he now says, what he now describes, as tin mill products, and has decided that that is the thing, that somehow there is some magic in comparing those.

Mr. McManus talked at length about this little CMI brochure, pamphlet. Mr. McManus says this was an expensive document that was prepared by a large staff; it was published year after year; obviously people relied on it. Mr. McManus said those things.

There is not one word to that effect in the record. I was hesitant to answer your question as to why this was prepared for fear I would be testifying. But does Mr. McManus know any of these things? Does he have the least idea of where this mimeographed sheet was prepared and why it was prepared and who relies on it and who looks at it?

He has had Continental people on the stand; he has had CMI people on the stand. What does he know about this thing? If he wants testimony of what it is, I say it is a [fol. 3431] publicity blurb that is thrown out and no one relies on it.

Your Honor asked some questions of Mr. McManus with respect to the so-called growth charts, the tables that show glass-container line and the can line and the metal container line, going from 1939 on up to some later date, and Mr. McManus indicated his belief that if you started from any date other than the one they had, that the results would be something approximately the same.

Your Honor will recall, however, that I specifically asked the witness whether there was not a possibility that those two lines might cross if they started from a different date, and the witness said there was such a possibility.

Well, your Honor, I believe those are the comments that I wanted to add.

RULINGS OF COURT ON OBJECTIONS TO EXHIBITS

The Court: All right, thank you.

Now, gentlemen, I am prepared to rule, and I will go through these things the way Mr. Johnson treated them by way of objection.

First, the first objection was raised to charts 2C, 3C and [fol. 3432] 4C of Exhibit 803, which is folder C.

As to those, the objections are overruled.

(Charts 2C, 3C and 4C of Government's Exhibit 803, folder C, received in evidence.)

The Court: As to chart number 9 on Exhibit 800 for identification, relating to closures, or Section IX of the chart book relating to closures, the objection is overruled.

(Section IX of Exhibit 800 received in evidence.)

The Court: As to 5C and 5D of folder C, Exhibit 801, the objections are sustained as to both of those.

Mr. Hughes: That is 803, your Honor.

The Court: I beg your pardon?

Mr. Kuhn: 803.

The Court: 803, yes, I'm sorry.

As to the tables comprising Section I of Exhibit 801, and Section V and VI of Exhibit 802, the objections are over- [fol. 3433] ruled and those tables are received.

(Tables comprising Section I of Government's Exhibit 801 and Sections V and VI of Government's Exhibit 802, received in evidence.)

The Court: As to Sections II and III of Exhibit 801, and Sections I, II, III, IV and VII of Exhibit 802, the objections are overruled and those tables will be received.

Mr. Handler: Will you repeat those numbers, your Honor?

The Court: Exhibit 801, Sections II and III, and Exhibit 802, Sections I, II, III, IV and VII.

(Sections II and III of Exhibit 801, and Sections I, II, III, IV and VII of Government's Exhibit 802 received in evidence.)

The Court: As to the part of Section III of Exhibit 800, and also Section V of Exhibit 800, which objections were

raised on the ground that contain unit figures that were [fol. 3434] based on improper conversions, the objections are overruled.

(Part of Section III and also Section V of Exhibit 800 received in evidence.)

The Court: As to Sections I and II of Exhibit 800, the chart exhibit, the objections are overruled.

(Sections I and II of Exhibit 800 received in evidence.)

The Court: As to table number 1C of Exhibit 803, the objection is overruled.

(Table number 1C of Government's Exhibit 803 received in evidence.)

The Court: As to Section IV of Exhibit 800, which relates to historical growth, I am going to overrule the objection, but I think it should be understood that I consider these charts of very, very doubtful value, and at the present writing at least the weight I will give to them will be minimal, if any.

(Section IV of Exhibit 800 received in evidence.)

The Court: Now, as to Section VI of Exhibit 800, the [fol. 3435] so-called common customer sales charts, the objections are sustained and those charts will be excluded.

As to Exhibit 1206, which is the report of the Sales Control Department of Continental Can with respect to sales to key customers and suppliers, the objection is overruled and that material will be admitted.

(Government's Exhibit G-1206 received in evidence.)

The Court: As to Exhibit 800, Section VII, the firm asset classifications from Internal Revenue statistics, first of all I will take Exhibit 1207, which are the basic Internal Revenue statistics from which Section VII of Exhibit 800 purports to have been made. The objection to 1207 is overruled and 1207 will be admitted.

(Government's Exhibit 1207 received in evidence.)

The Court: Insofar as Section VII of Exhibit 800 is con-

cerned, the objection will be overruled and they will be [fol. 3436] admitted.

(Section VII of Exhibit 800 received in evidence.)

As far as Exhibit 1202 is concerned, which is the Can Manufacturers Institute figures, I understand that most of the figures, the basic figures, in that table agree with the census figures, and there is testimony to that effect insofar as base box totals are concerned. As far as the balance of material is concerned, I have, frankly, very grave doubt as to whether there was sufficient foundation laid. However, at this point I am going to admit that material subject to a motion to strike, and I am going to make the same caveat, subject to a motion to strike, with respect to all the material in any of these exhibits which we are discussing, which relate to a certain figure for cans predicated on the pamphlet of the Can Manufacturers Institute.

(Government's Exhibit 1202 received in evidence.)

[fol. 3437] The Court: With respect to Exhibit 809, the plastic tables, the objection is overruled and the plastic tables will be admitted.

(Government's Exhibit 809 received in evidence.)

Now I want to reemphasize in making these rulings that the admission of any document is not in any way an endorsement by the Court of the weight to be given to a document or any indication as to the amount of weight that will be given to it. I have already indicated with respect to several of these documents that I think they are pretty feeble as far as having any probative value or weight is concerned. I think you might as well know that I consider the plastic tables not so much in terms of the accuracy of any figures that may be included in there, but as to the significance of the figures, of very doubtful value indeed.

The same may be said with respect to a number of other tables that have been admitted in evidence.

I am saying that so the government will not assume that because a table has been admitted into evidence they can [fol. 3438] proceed from there without giving the most careful consideration to the question of the weight, the sig-

nificance of the tables, in the light of the picture that is before me and their relation to the issues.

Now, I do not know, gentlemen, whether the rulings I have just made cover the offers in full. Insofar as they do not cover the offers in full, anything in Exhibits 800, 801, 802, 803 and 809, which was not covered by a specific ruling in the rulings that I have just made, as to any other such material, the objections will be considered to be overruled and the material admitted, that is, if I have omitted anything in my specific rulings.

Mr. Johnson: I think your Honor's rulings are very precise.

However, I should like to ask a question with respect to this G-1206, which was the additional starter here this morning.

I don't now understand what it was offered for or what [fol. 3439] it is intended to prove.

The Court: I think that is a fair question and I think Mr. McManus ought to tell us.

Mr. McManus: Your Honor, as I understood it, we had made an offer of what we considered common customers between Hazel-Atlas Glass Company and the Metal Can Division of Continental Can, and you indicated that you thought those tables were highly misleading. I could understand—well, maybe I couldn't—but at least I understood some of the problems you have with the tables, and we, in effect, are offering the basic data in lieu thereof, which we feel shows the common customers of Continental Can Company and Hazel-Atlas Division, and also, we think the table will show part of our full line position.

Mr. Handler: Will show what?

Mr. McManus: Part of our full line position, which indicates that Continental sells a number of products of these types, such as paper and cans, caps and so forth to the same [fol. 3440] common customer. We think that that is what that table will show, and that is what it is offered for, primarily the first, but also the second.

Mr. Johnson: It is offered then for these purposes without any showing what it is all about or—

The Court: Well, the difficulty with that is, Mr. Johnson, that this has got, as I read it, quite an elaborate description

of what it purports to be in the second page, which I have read, and I presume that it is what it purports to be.

Mr. Johnson: Well, your Honor, I believe I am entitled to a witness on that subject, as to—

The Court: You may call him, and if you find, if you get as far as your case, it appears that this is not what it purports to be and for some reason it ought to be excluded, you can make a motion to strike. This is true of any exhibit which I have admitted from the files of Continental Can, [fol. 3441] concerning which there has been presently up to now no testimony.

Mr. Johnson: Yes, sir. It is not simply a matter of being what it purports to be, but also of explanations of what it is.

The Court: Well, you are perfectly entitled to make all the explanations you want to, and, Mr. Johnson, you may show, for all I know, that instead of helping the government this material is very helpful to you.

Mr. Johnson: I understand that.

Mr. Handler: Your Honor, I am going to be confronted very shortly with the argument on the motion to dismiss, and I will have to deal with this exhibit.

I find quite unenlightening the first part of Mr. McManus' statement, in which he says that the exhibit purports to show common customers. The second part of the statement I understand. He says he wants to use it in terms of his full line contention.

There is no issue in this case as to whether or not there [fol. 3442] were common customers. What would be significant about the offer is the inference that he wants to draw from the fact of common customers, and on that he has been silent.

Now, the document does not purport to show competition between Hazel-Atlas and Continental Can for the patronage of the common customers, and I think that Mr. McManus ought to state now whether or not he at any time is going to call your Honor's or another court's attention to this exhibit and ask that an inference be drawn that by virtue of the fact there are common customers, that there is competition. Because the fact of the matter is that a common customer listed in this exhibit might be an oil company that buys oil cans from Continental and buys tumblers from Hazel-Atlas, to be used for promotion, and this exhibit

doesn't say one word about the products that are being purchased by the common customers, and it would be a most misleading use of the exhibit to say that it shows competition. [fol. 3443] The Court: What do you say to that, Mr. McManus?

Mr. McManus: Your Honor, I think with all due respect to Professor Haudler we are starting a day earlier. I think that inferences can be drawn from this document of the effect of having common customers, and I think the government will.

Now, the defendants have every right, as Mr. Handler has just indicated, to draw inferences contrariwise, and you have indicated also, your Honor, that they have every right if they get to that stage for them to call a witness who will testify that this does not mean this, but it means something else. But I think a fair reading of this document would show the common customers of these various divisions in glass, cans, things of that nature, to show the common customers, and inferences can be drawn that that gives them an advantage, and we would like to draw them.

Mr. Handler: If your Honor please, right after your [fol. 3444] ruling I think that a motion to strike is quite in order, because I think that this is a most unusual and extraordinary procedure. The document was offered in evidence at your Honor's invitation in order to serve as an explanation for an exhibit which your Honor now has excluded. Now, it is one thing to have a document in which would enlighten the Court on reading an exhibit. It is quite another thing, without a witness, without any effort, to offer evidence surrounding the execution of this document and to ask your Honor at this stage of the record to draw an inference of competition from the fact that there were common customers. Certainly there must be a greater predicate than that.

The Court: Professor Handler, in order to ask me to draw an inference from this document that there are common customers in some significant sense, significance in having relation to the issues in this lawsuit, Mr. McManus will have to show me something in this document that leads to such an inference.

[fol. 3445] Mr. McManus: That's right.

The Court: Now the fact is that the charts which I ex-

cluded and which Mr. McManus, I think, introduced to demonstrate the inferences that could be drawn, I have excluded them. At the present time I am not drawing any inferences from this material. I say this is offered, the key customers and suppliers of Continental Can, in my judgment, as having some relevance in this Section VII proceeding.

Now, the inferences to be drawn from it, or what they establish, are another matter entirely, and I do not for the moment want it understood that by admitting this or any other document in evidence I am drawing any inferences.

Mr. Handler: Thank you, your Honor.

The Court: All right.

Mr. Johnson: May I ask your Honor that 1206 be treated as a particularly confidential document?

The Court: I can easily see why, Mr. Johnson.

Mr. Johnson: Yes, sir.

[fol. 3446] The Court: The very heading of the document indicates the necessity for its being treated as confidential material, and it will be ordered to be part of the sealed record in this case and not disclosed to anyone outside of counsel for the parties.

OFFERS IN EVIDENCE AND COLLOQUY BETWEEN COURT AND COUNSEL—

Mr. Johnson: There were several items marked for identification on cross-examination. Some of those I should like to offer at this time in the light of your Honor's rulings.

I offer first Defendant's X for identification, consisting of defendant's interrogatory 6 and plaintiff's answer to interrogatory 6B.

Mr. McManus: Could I have the purpose, your Honor?

Mr. Johnson: The purpose is to show that the government, in answering the defendant's interrogatories, said that it had no reason to verify the accuracy of Can Manufacturers Institute data.

[fol. 3447] The Court: Any objection?

Mr. McManus: No objection, your Honor.

The Court: It may be received.

(Defendants' Exhibit X for identification received in evidence.)

Mr. Johnson: I next offer that portion of Defendants' Exhibit Y for identification which is the United States Department of Agriculture Bulletin No. 24 under the heading "Trend in Canned Vegetables to Smaller Size Cans."

The Court: Any objection?

Mr. McManus: No objection.

The Court: It may be received.

(Defendants' Exhibit Y for identification received in evidence.)

The Court: Now, something just occurred to me that must be cleared up:

When I stated a few moments ago that with respect to Exhibit 803, among others—Exhibit 800, I think—where is the prior acquisition table?

Mr. Johnson: That is in 800.

[fol. 3448] The Court: 800. I thought so. When I said that everything in 800 was to be admitted if not specifically covered, I did not refer to 808, which is the prior acquisition table which we have still got to discuss and which I have to pass on.

Mr. Johnson: I think you caught us asleep, your Honor.

I have also several physical exhibits referred to in the cross examination which I now want to offer: Defendants' Exhibit 105 for identification, Defendants' 113 for identification and Defendants' 122 for identification.

The Court: Those were some of the things you offered as examples on the cross examination.

Mr. Johnson: Yes, sir.

The Court: Any objection?

Mr. McManus: Your Honor, if they are the ones that I stipulated to previous to the start of the case, if they are what they say they are, I have no objection.

[fol. 3449] The Court: All right. They may be received.

(Defendants' Exhibits 105, 113 and 122 for identification received in evidence.)

Mr. Johnson: I offer also Defendants' 210 for identification, Defendants' 212 for identification, Defendants' 214 for identification and Defendants' 215 for identification.

Mr. Greenberg: If the Court please, may we have the scope and purposes of the offer?

The Court: No. They are samples, again, that we used on cross examination of a witness, and we don't have to have any further definition of this.

Is there any objection to it?

Mr. Greenberg: May I examine them for just a moment, please?

The Court: Of course you may.

As I recall them, some of them are labeled "Polyethylene jar with a polystyrene lid," if I am not mistaken. Now, I presume somebody wants some indication that they are what [fol. 3450] they say they are. If you want a witness for it, I am sure they will get you a witness, but it seems to me an enormous waste of time.

Mr. Greenberg: No objection.

The Court: They may be received.

(Defendants' Exhibits 210, 212, 214 and 215 for identification received in evidence.)

Mr. McManus: Your Honor, I understand that those are the ones that we stipulated that they are what they purport to be, and that is what we are admitting them for.

The Court: All right.

Mr. Johnson: With respect to each of those, there is a stipulation—

The Court: All right. Mr. McManus has just conceded that there is a stipulation on them, and that they are what they purport to be.

Mr. Johnson: I offer next Defendants' Exhibit BB for identification, CC for identification, DD for identification and EE for identification. With respect to these items, your Honor, there is no stipulation. These are items which were [fol. 3451] used on the examination of a witness.

The Court: All right. I will admit them. If you find any error in them anywhere, move to strike them and I will hear you at that time.

Mr. Greenberg: If the Court please, I would like to make one comment for the record: The stipulation does not, nor is there any evidence of what these containers hold or can hold or whether they are appropriate for sale in the lines of commerce that we had specified, to wit, drugs, cosmetics—

The Court: I will look at them, and I will know pretty

well after this lawsuit whether they are suitable for sale in the line of commerce that we are talking about.

(Defendants' Exhibits BB through EE for identification received in evidence.)

The Court: As far as the rose dust is concerned there, I have used that on a rose bush on a roof in New York.

All right.

Mr. Johnson: That is all I have.

[fol. 3452] The Court: Now, presumably before we go to a different subject matter, we are going to take a brief afternoon recess. I take it the next order of business is the prior acquisition.

Mr. McManus: Yes, sir.

The Court: And so that I may be clear on that, the evidence on prior acquisitions offered by the government is what?

Mr. Greenberg: The exhibits are G-785 and G-786.

The Court: I see.

Mr. Handler: If your Honor please, there are three exhibits that have been marked so far: G-785, G-786 and the page in G-800 to which you refer.

The Court: Yes.

Mr. Handler: In addition, your Honor, there are two documents that have been marked by the government since the July recess which in part deal with this subject, and I wonder if it wouldn't be a good idea for them to be formally offered at this time so that I might be able to discuss all [fol. 3453] documents having to do with prior acquisitions at one time. I am referring to G-788, which is a resolution of board of directors of Continental Can, and G-900, which in part has to do with this subject, particularly with reference to the Obar & Nestor transaction.

I would like counsel for the government to make a formal offer at this time.

The Court: I will have a formal offer made. I want to see what we are dealing with. I will have those two exhibits which were just mentioned to take in with me.

Mr. Greenberg: Your Honor, if you are taking them in, I would like to point out that with respect to G-900 we are offering only pages 8 through 34, and we are offering 788.

(Short recess.)

The Court: All right.

(Discussion off the record.)

The Court: Let the record show that Mr. Martin Jacobs, representing now Mr. DeMerrell, an officer of Anchor-Hock-[fol. 3454] ing Glass Company, who testified on June 27, 1960, has presented a letter which has been shown to counsel for both sides, in which Mr. DeMerrell corrects certain answers given in his testimony on the record at page 1498 of the transcript on June 27th last.

In accordance with the Court's suggestion, the government has offered the letter of Jones, Day, Cockley & Reavis of Cleveland, addressed to Mr. McManus, dated October 14, 1960, which makes these corrections. The letter has been offered by the government and will be received as Government's Exhibit 1208 in evidence.

(Government's Exhibit G-1208 received in evidence.)

The Court: This corrects the record, and if counsel wish to go through those mechanics, they may arrange to have the copies of the record physically corrected in accordance with the terms of the letter, should they deem that desirable.

Mr. Jacobs: Thank you very much, your Honor.

Mr. Greenberg: If the Court please, last June the government [fol. 3455] had offered certain documents which related to so-called prior acquisitions. At that time Mr. Handler submitted a brief to his Honor with copies to government counsel in which he made his formal objections on the grounds of relevancy and materiality to G-785 and G-786. In that brief he amplified the grounds that he stated, and the government is prepared now to argue in rebuttal.

The Court: I see.

We are now arguing with respect to the government's offer of Exhibits 785 and 786 for identification, which have not yet been ruled on.

Now, do I understand that there are other documents which the government claims bear on the question of prior acquisitions, and which the government is now offering?

Mr. Greenberg: Two other documents bear in part on the question of prior acquisitions and a contemplated acquisition by Continental Can. I hasten to add, however, that we offer the two documents involved, G-788 and G-900, for all

[fol. 3456] purposes. G-900, however, is limited to an offer of pages 8 through 34.

To the extent that these two documents pertained to the argument on prior acquisitions and contemplated acquisitions, we agreed to discuss them and to offer them along with G-785 and G-786.

The Court: And, of course, there is also implicit in all this the chart 8 of Exhibit 800, which purports to be some sort of pictorial representation of prior acquisitions.

All right.

Mr. Greenberg: If the Court please, I would desire now to commence the government's argument with respect to prior acquisitions.

The Court: Well, the question is, who comes first?

Mr. McManus: That's correct. I suppose that the government really has the burden of showing the Court why prior acquisitions should be admitted here and how they are relevant.

The Court: What do you say to that, Mr. Handler?

[fol. 3457] Mr. Handler: We are objecting, your Honor, and I think I ought to be able to present my objection, and then it would seem to me the normal thing would be for Mr. Greenberg to respond.

The Court: Well—

Mr. Greenberg: Your Honor, the government, in light of the fact that Professor Handler has submitted a brief to you in June, would prefer to open the discussion.

The Court: Well, Mr. Handler submitted the brief to me in June, Mr. Greenberg, and I got a brief from the government at 3:27 this afternoon. It doesn't seem to me that that gives the government any privilege of opening.

I have not read your brief. As far as I know, before I pass on this question, which I intend to pass on at the conclusion of the argument, unless something rather peculiar happens, I will not have read the government's brief by that time, and I am frank to say that if the government expects me to read their briefs they must not wait from June 27th until 3:27 on October 17th when the argument is to be held and [fol. 3458] expect me to read their brief.

Mr. Greenberg: Your Honor, may I make one comment? This brief was intended only to supplement our arguments in court, and I wish to add that for the record, and of course

we would prefer if his Honor did read the brief, but, as I stated before, it merely supplements our arguments.

The Court: I will hear from Professor Handler on his objection, and then I will hear from you.

Mr. Greenberg: Thank you.

Mr. Handler: If the Court please, I am very much in the position of a pitcher who has been in the bullpen warming up for the past 10 days.

The Court: This is really also part of the warm-up process, Professor Handler, what I expect to hear from you tomorrow or the next day. This further warm-up may be good for you.

Mr. Handler: There are now before your Honor a proffer of five exhibits. I should like to address myself first to [fol. 3459] three and subsequently I shall turn to the latter two.

The three exhibits, briefly, consist first of 785, which is a voluminous document, consisting of a comprehensive letter to Mr. England of the Federal Trade Commission by the Willkie firm in response to an inquiry from him.

The Court: That is what—785?

Mr. Handler: I believe it is 785—786. I beg your pardon.

The Court: 786.

Mr. Handler: But chronologically it comes first.

Attached to this document of some 36 pages are many financial statements in the form of exhibits.

The document purports to summarize the various acquisitions made by Continental, the earliest was December 6, 1926, and it runs through to an acquisition on September 21, 1944. Each of these acquisitions is separately discussed in separately numbered paragraphs.

[fol. 3460] Now, in addition, there is an Exhibit 785, which was a table of six pages, likewise prepared by the Willkie firm, which was submitted to the Department of Justice as an exhibit to a letter answering many questions which the Department put to the defendant.

The Court: Was that in answer to an interrogatory?

Mr. Handler: No, this was in answer to a letter of inquiry before the suit was started.

This purports to summarize a substantial number of acquisitions during the period from 1942 to 1956. It lists the names of the acquired company, the form of acquisition,

the date of acquisition, the product line of the company, and then the information furnished to the government with respect to the acquisition.

Now, the third of the group of exhibits is the table to which frequent reference has been made, the chart in Government's Exhibit 800. By my numbering it is page 92. And this chart purports primarily to be based on the two previous [fol. 3461] exhibits.

Now, the complaint in this action, in paragraph 6, alleged that since 1942, Continental has acquired more than 25 independent business enterprises. Accordingly, the defendant, in an interrogatory, requested the government to state how and precisely in what manner the acquisition by Continental of each of these 25 businesses is claimed to be relevant to the acquisition of Hazel-Atlas by Continental or the charges made in the complaint in respect thereof. The government answered that these prior acquisitions are relevant in the present case in so far as they involve a company engaged in the production, manufacture and/or sale of containers, container products and related products.

Now, I presume that this answer does not relate to Continental. I don't suppose the government is saying that the acquisitions are relevant because Continental is engaged in the container field. I would suppose that the answer has to do with the acquired companies.

[fol. 3462] Now, there are two points that I want to make to that answer. The first is, as Mr. Johnson brought out in his cross examination of Mr. Tolton, that the proffered exhibits are not confined to container companies at all. They relate to companies engaged in fields remote from and not connected with containers or accessory lines. Indeed, if you look at the bottom of the chart, you find a caption, "All Others," and seven companies are listed under "All Others." Mr. Johnson brought out that some of the companies are engaged in businesses that are most remote from the packaging field. For example, we call your Honor's attention to the Tenco Company, which is engaged in the manufacture of plastic pipe fittings. He referred to Wallace Container Company which makes Vinite collapsible tubing.

The Court: What is that used for, Mr. Handler?

Mr. Handler: What is that?

The Court: What is that Vinite tubing used for?

[fol. 3463] Mr. Handler: I will have to find out, your Honor.

Mr. Johnson informs me that the Wallace Company is extinct and we don't know what the tubes were used for, and I used the past tense for Tenco. I should use the present tense. They are making plastic pipe fittings.

The Court: Aren't they discontinued too?

Mr. Johnson: I believe. It is not quite correct that I don't know what they were used for. I believe that Wallace Container Company at one time did make tubes. Now, whether that is the principal product or not, I don't know.

Mr. Handler: Apart from the fact that these documents, and particularly 786, embrace acquisitions of companies that are not engaged in this field, more important than that is that our contention is that these prior acquisitions, even if in this field, are lacking in relevance and in materiality.

For example, some of the acquisitions have to do, if you [fol. 3464] look at the chart, with the canning machinery phase of Continental's activity. You haven't heard a word in this case of any anticompetitive effect as charged in the field of canning machinery. And some of these companies were in the flexible packaging field. What you have heard about flexible packaging is that the government claims that fresh food packaged in flexible packaging is not to be treated in the same breath with foods packaged in tin and in glass.

Now, having regard for the type of contention that has been made in this case, and considering relevance and materiality in terms of the issues litigated here and not in some abstract fashion, what is the significance that the government attributes to acquisitions of the character to which I have just referred?

Now, I come to acquisitions in the canning field and to the acquisition now in question in the glass field.

At pretrial your Honor asked a series of extremely pointed questions of government counsel to clarify this [fol. 3465] phase of the case, and their answers may be summarized by saying unqualifiedly that they admitted that the prior acquisitions have no materiality to this litigation. Now, that, of course, is my conclusion, which I shall endeavor to support by reference to the colloquy.

Now, I define materiality the way the books on evidence

define materiality, that is to say, evidence without any legal significance to the issues in the case at bar.

Now, your Honor asked first, is the government challenging the legitimacy of the prior acquisitions, and the answer was that they are not challenging those acquisitions.

Your Honor next asked: Would this case have been brought if there had been no prior acquisitions. Is the government claiming that this acquisition is unlawful, standing on its own footing, separate and apart from the prior acquisitions? And the answer was, "Definitely, yes."

And, finally, your Honor asked: What is the significance of the prior acquisitions? And Mr. McManus told you that [fol. 3466] if all he had was evidence of prior acquisitions he couldn't make out a case.

Now, that is asking the same question, I submit, in three different ways, and the fundamental question is; what is the legal significance of this evidence, and the answer is that it has no significance because you have got to determine, as the statute commands you to, the legitimacy of this acquisition on the basis of its own facts. It is this acquisition whose effect upon competition must be determined as a pre-condition to any finding of illegality.

Now, Mr. McManus, in his answers to the interrogatories, and frequently at pretrial, gave a second reason as to why he was referring to the prior acquisitions. He said that the prior acquisitions are relevant on the theory that they may be part of a cumulative process described in House Judiciary Committee Report No. 1191, and at one point, when you were trying to draw out from him the legal theory underlying his contention of the significance of prior acquisitions [fol. 3467], he said, and I quote, referring to the pre-trial transcript at page 872:

"The only reason I say so, your Honor, is what the committee reports tell me."

Now, the burden of my argument today, and it is an argument which I believe has never been made before to any court, is that the committee reports do not tell Mr. McManus what he said they "tell me." On the contrary, they tell him precisely the opposite.

Now, your Honor is familiar with the monumental work

of the late and beloved Justice Cardozo, who enumerated the three basic ways in which judge law develops: the method of history, the method of logic and the method of sociology. He did not mention the method of error, and law develops through misreading of significant documents, through false logic, through erroneous history and through invalid sociology, and what your Honor is confronted with here is false history.

The government, not only in this case but in many cases [fol. 3468] instituted under Section 7, has misread the House report, and I think your Honor is going to be called upon, for the first time since this statute was enacted, to read the House report exactly as it appears in the printed document, and I invite your Honor's attention, if you have our memorandum of law, to page 5.

The Court: I have it before me.

Mr. Handler: Now, there the House committee was answering the question: would the bill merely duplicate the Sherman Act, and it is pointed out that the bill is not intended as a mere re-enactment of that statute. Then comes the key paragraph which I would like to read with your Honor's permission:

Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as a result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition [fol. 3469] may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly or constitute an attempt to monopolize."

Now, you have got to read this report exactly as it is written, and you have got to recreate the situation which gave rise to this legislation. At the time of this legislation, there was only one instrument, one legal instrument, by which acquisitions of assets could be challenged. That was the Sherman Act, and Your Honor will remember that in the Alcoa case, where Judge Hand presided over a statutory court, he made the observation, which has been much

quoted, where, in defining monopoly, he said that 90 per cent is clearly sufficient—the percentage referring to market share—66 or 64 per cent might not be sufficient, 33⅓ per cent was clearly not sufficient.

Now, the 64 per cent had to do with the decision in the [fol. 3470] 1926 term of the Supreme Court, where the court upheld International Harvester, a company, which through acquisitions, had achieved a 64 per cent market share.

Under this statute, in attacking mergers, you had to wait until the company had achieved a monopoly position. You couldn't go after a single merger if it fell short of monopoly. You had to wait until the aggression was large enough, and that is why you considered the series of acquisitions, and that is why in such historic landmark cases as the Standard Oil of New Jersey decision by Chief Justice White in 1911, he reviews the various acquisitions of the Standard Oil trust which led to their having a dominant and monopoly position which the court adjudged to be unlawful and ordered dissolution.

But the whole point of this legislation was to permit intervention in the legislative process at any stage. You did not have to wait until the end. You could go after each and every acquisition if it had the effect of substantially lessening [fol. 3471] competition, and that is pointedly, unqualifiedly and, I think, most lucidly set out in the language I just quoted. But you can intervene even though the effect of the challenged position may not be so far reaching as to constitute a monopoly menace.

Now, my good friends have referred in the memorandum which they submitted today, at the very last page, to certain authorities. They refer to Judge Weinfeld's decision in Bethlehem Steel, to Judge Weber's decision in Brown Shoe, and they also refer to the Senate report, all of which I shall want to address myself to.

Now, if you will turn, your Honor, to page 4, I believe, of the government brief, and look at the first paragraph, they refer to this intervention in a cumulative process. They then say that it, the statute, is addressed to growth through a series of small acquisitions, referring to the Senate report, page 5. Well, let's see whether they have correctly interpreted the Senate report in this regard.

[fol. 3472] Page 5 of the Senate report reads:

"Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another but is unlikely to be perceived in a small acquisition by a large enterprise."

And here is the sentence from which they quoted a part:

"As a large concern grows through a series of small acquisitions, its accretions of power are usually so minute as to make it difficult to use the Sherman Act test against them."

That is the very same point that I have made, not the point that they would imply in the quotation on page 7.

Now in the next sentence, the quotation on page 4 of the brief—I was in error—in the next sentence in that paragraph of page 4 they say:

"Consideration is to be given to the circumstances giving rise to the acquisition."

[fol. 3473] Again they quote from the Senate report. Let me read the whole sentence:

"It is expected that in the administration of the Act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition."

Certainly the circumstances surrounding the acquisition at the time it is made, not the circumstances having to do with other acquisitions which are not in suit.

It is noteworthy in this Senate report—and I think I should call this to your attention because it is the fundamental error that has been made by Judge Weber in the Brown Shoe case, which is now up on appeal before the United States Supreme Court—you will remember the sentence I read from the Senate report which says:

"As a large concern grows through a series of such small acquisitions, its accretions of power are usually

so minute as to make it difficult to use the Sherman Act [fol. 3473a] test against them."

Now, Judge Weber took that sentence, which, incidentally, is not a sentence of the Senate committee, which is a sentence which the Senate committee quoted from a Federal Trade Commission report on the merger movement, to which I shall shortly refer.

[fol. 3474] Judge Weber took that sentence and he said, "This sentence is proof positive that the Congress intended to prohibit minute acquisitions," and he said in Brown Shoe that the acquisition was certainly of large enough dimension to be denominated a minute acquisition; therefore, the acquisition was unlawful.

Now, on page 20 of their memorandum, where they speak of authority, they rely upon Judge Weber's decision.

I will not deny, your Honor, that Judge Weber refers to prior acquisitions by Brown Shoe in his opinion. Nor will I deny that Judge Weinfeld, in Bethlehem Steel, likewise refers to prior acquisitions. But that is a far cry from saying that these two learned judges would have refused to sustain an objection to this evidence had the objection been lodged. There is nothing in the opinions to show that the point that is now before you was considered by them.

Frankly, because I think you want and are entitled to complete frankness on my part, I don't know what these [fol. 3475] fabulously long records show in this regard. I do know that the fabulously long opinions written by these judges do not pass upon this point.

I go even further, your Honor, in the interests of complete candor: I certainly have no knowledge—and I have followed, as you are aware, all of these merger cases since the statute was enacted in 1950—I am not aware that these arguments were called to the attention of Judge Weinfeld or Judge Weber. Certainly the issue in those cases may very well have been buried in trials of extraordinary length. All I know is that the House report upon which Mr. McManus relied and which he said to you was the basis upon which he argued the relevance, and he said, "I think that it is relevant, your Honor, because the committee reports tell me it is relevant"—I am paraphrasing what he said—well, I say

that the committee reports do not say that prior acquisitions are relevant.

[fol. 3476] Now, I am not going to burden your Honor with any extended analysis of the Senate report. The House report is sufficient. It is enough for present purposes to call your Honor's attention that the Senate report quotes in part from the Merger Movement, and if you read the Merger Movement you have the same distinction that is made in the House Report.

Under the inadequate statute it had to wait until the acquisitions achieved the dimension of monopolistic matters. You had no instrument to step in and challenge the particular acquisition where it did not involve monopoly.

The Court: Well now, Mr. Handler, assuming your argument that under the House report and the Senate report on question 7 neither of such reports authorizes the admission, or I scarcely see how they can, the admission of these documents or make the documents relevant—I have grave doubt whether you could start making documents relevant by reports of the Congress, which are useful for a variety [fol. 3477] of purposes, but are not at all sure that is one of them—but assume that they are not, assume that those reports have the effect of making this material relevant, I wish you would address yourself to the point of why it may not be relevant regardless of what they say?

Mr. Handler: That is precisely the point where I find myself, your Honor.

I think that the government, in offering this testimony, wants you to draw some inferences, and I have the same difficulty here that I have throughout the case in ever finding out what are those inferences which they want you to draw.

The Court: Well, of course, you see, I am in something of a dilemma here, too. I am in a dilemma by reason of some of the objections from the defense upon the theory that the matter should be excluded because I might draw the wrong inferences from it. I don't think that that is necessarily an argument for the inadmissibility of the testimony, of the evidence.

[fol. 3478] Mr. Handler: I couldn't agree with you more, your Honor. When I chide my good friends for being silent about the inference that they want you to draw, I am not chiding them because you are going to confuse inference

with admissibility. I chide them without knowing the inference it is extremely difficult for me to know what is the ultimate proposition of fact that they are trying to prove by this document. They tell you, as they told us, that "We are trying to prove that there were prior acquisitions." Earlier today Mr. McManus said, "This document shows common customers."

Well, these documents show prior acquisitions. So what? What is it they are trying to prove?

Now here, your Honor, I come to what is the essence of this matter. Obviously they think that prior acquisitions has something to do with a section VII case. They are not offering this evidence here for you to pat us on the back [fol. 3479] and say, "Well, you were good people in making these prior acquisitions." They want you to draw some inference adverse to us. They have some proposition that they are trying to establish, and that proposition obviously is deleterious.

Now, if your Honor please—

The Court: I don't want to interrupt your thread, but let me ask you this: let's suppose that instead of offering evidence about prior acquisitions by Continental, the government offered a historical survey of the industry in the last 20 years. Assuming we knew precisely what the industry was, assuming we have a well defined industry and the government said "We want to show your Honor what the history of this industry was during the past 20 years," would you say that that was irrelevant and immaterial in a Section VII case?

Mr. Handler: I would say, your Honor, I would quote your Honor the big case report, where the judges who [fol. 3480] studied this problem have urged—yes, I am referring to the Prettyman Report and this new report has been promulgated by Judge Murtagh.

The Court: If you want to get along with me, don't quote me the Murtagh Report, which is what I call a long and protracted report of a long and protracted conference on long and protracted cases, that still continues in its long and protracted fashion, and it does not impress me, frankly.

Mr. Handler: Well, your Honor, I think you should be and are impressed by the fact that it is necessary in these

cases to have some terminal point, a point of beginning and a point of end.

The Court: I agree with that.

Mr. Handler: And it is the consensus of all the Federal Judges, and I have never seen anyone express a dissenting opinion.

The Court: I may agree with everything the report said. My only difference is it has all been said 45 times before [fol. 3481] by 45 other committees and people.

Mr. Handler: Precisely.

The Court: Stretching back for ten years.

Mr. Handler: I agree with that. But the nub of the matter is that these cases have to be compressed within manageable proportions.

The Court: Yes.

Mr. Handler: And we are not here engaged in writing a doctoral dissertation. You go into history if history is going to shed some light on the present, if it is going to enable your Honor to determine whether this acquisition of Hazel-Atlas may have the effect of substantially lessening competition. But if it is offered for that purpose and it doesn't shed any light, or if it sheds a misleading light on the problem, then it seems to me that it is not relevant.

Now let me explain what I mean by this: You heard Mr. Johnson cross-examine Mr. Tolton. Mr. Tolton had been asked by Mr. Johnson, "Do you know whether the government [fol. 3482] ment ever encouraged any of these mergers on page 92 of Exhibit 800?" And he said he didn't know, after Mr. McManus objected.

Then Mr. McManus, on redirect, said, "Do you know whether the government ever discouraged any of these mergers?" and the same answer, "I don't know."

Now, the predicate of Mr. McManus' redirect examination was very clear to me. He was trying to signal to your Honor that these acquisitions had not been encouraged by the government.

Now let me read to you Exhibit 900, which the government is now offering in evidence.

The Court: Well, as a matter of fact, I may say to you that during the recess I read practically all of the pages except for the figures and statistics and tables, I read all of the text from pages 13 to 34 of Exhibit 900.

Mr. Handler: Did you read, your Honor, the bottom of page 31 and page 32?

[fol. 3483] The Court: Let me just see.

Yes.

Mr. Handler: Now, our proposition is this, your Honor: Do you remember that at pre-trial you indicated that you would not grant us an order for the production of material in files of the Department of Justice which has to do with these acquisitions. We made the statement then and we make it in this document, which the government now is offering in evidence as part of their case, we made the statement then that the government of the United States encourages many of these acquisitions, because the government of the United States, after Judge Rose's decision in the American Can case, where he refused to order dissolution, encouraged the creation of a large company that could compete effectively against American Can.

Now I submit that it is contrary to all principles of justice for the plaintiff in a litigation to offer documents from which it wants to prove a proposition of fact, when it has in [fol. 3484] its own possession evidence which negate the fact that it is endeavoring to establish.

I go further, your Honor. The law in this country, and particularly in this circuit, is that when the United States Government comes into court and tenders a witness or tenders a document, it is under an obligation to furnish the Court with all documents relevant to the document in question, and if it fails to provide the Court with those documents, the case has to be dismissed. That is Judge Hand's decision.

The Court: I am quite familiar with that principle.

Mr. Handler: Now we say that we don't understand what this evidence relates to. If it relates to the fact that we made prior acquisitions, and that is supposed to establish some deleterious tendency, pattern or trend on our part, we say that these exhibits prove nothing of the kind.

What does the table prove? It lists a lot of names. What [fol. 3485] does 785 do? It calls attention to the fact that many of these acquisitions were reviewed with the Department of Justice. And the opening pages of 786 expound the same philosophy as is embodied in 900.

Now, are they trying to show that we made prior acquisitions because the government of the United States wanted us to do so? If that is the fact, what light does that shed on whether this transaction is lawful or unlawful? What does history mean in the context of this litigation?

We bought other companies. Now what does that mean, so far as whether or not the line of commerce are the ten enumerated by the government, or whether or not there has been or is likely to be a substantial lessening of competition in any of those lines?

Now I shall briefly advert to their brief, where they endeavor, I suppose, to meet some of these arguments, and to clarify what they said at pre-trial.

My good friends have a very beguiling habit of testifying [fol. 3486] in the guise of arguing, and I know that your Honor accepts what they write or what they say merely as argument and not as proof. But turn if you will to page 5, the first sentence under "Past acquisitions and the effect of the present merger.

"The history of past acquisitions by Continental and by other firms manufacturing packaging items is material to show that the effect of the Hazel-Atlas acquisition may substantially lessen competition by making it necessary for competitors to merge in order to keep up."

Now, you had 16 glass companies here. You had Solinsky. You had Plax. Where is the evidence? Where is the evidence in this record that it is necessary for competitors to merge in order to keep up? Who says this beside the Yale note, which is not evidence, and the government?

I continue reading:

"The evidence of past acquisitions will show how the growth of Continental by mergers has given the decisive [fol. 3487] advantages vis-a-vis smaller less diversified manufacturers in all of the lines in which Continental deals."

Now, again, where is that evidence? You have heard many promises about "decisive advantage," and I intend to deal with this fully on my motion to dismiss. At this point I merely ask how dare they make a statement that our acquisitions have given decisive advantages over smaller

less diversified manufacturers in all the lines of commerce in which Continental deals?

Then the next sentence:

"The government has introduced some evidence of mergers that have followed and paralleled Continental's mergers."

They gave you evidence of mergers of can companies, of companies engaged in the manufacture of canning machinery; companies engaged in the manufacture of flexible packaging; companies engaged in the manufacture of paper; companies engaged in the manufacture of crows. I'd like [fol. 3488] Mr. Greenberg to give you record references where they have introduced evidence of mergers in other fields that have paralleled Continental's mergers.

Now going back, they speak about putting pressure—going down to the next paragraph—"putting pressure on all package and closure manufacturers to present a comparable full line."

Where is the evidence of that?

Is it evidence from Mr. McManus and Mr. Greenberg to make the statement? Why didn't they ask that question of these companies that took the stand? They had chairman of boards; they had presidents; they had executive vice presidents—you had a Who's Who of these industries appear before you. These were the gentlemen who were knowledgeable. Why weren't they asked these facts?

This is what they were trying to prove and if they had proved decisive advantage, if they had proved that they would put pressure, if they had proved that we had altered the patterns, well, you wouldn't need this kind of evidence. [fol. 3489] You would have it already. This isn't the way to prove these kind of facts.

Now, the essence of it, your Honor, is that history adds absolutely nothing here. I am not going to take the extreme position that somehow, somewhere, in some set of circumstances you might not have a case where you would find it enlightening to delve into the past. But you are not dealing with this problem, nor am I, at the threshold of a case. We are on the eve of the government's resting. We know their case now. Now, if they had offered this at the very begin-

ning, they would then be able to say to you, "Well, your Honor, wait awhile and you will see its relevance."

There is nothing to wait for. What will history, what will prior acquisitions enlighten your Honor on? How is it going to help you in deciding the two basic issues here—relevant markets and whether or not there has been a substantial lessening of competition, in actuality or in prospect?

[fol. 3490] Now I want to end with just one more word. I am always very flattered when my adversaries quote from me or cite me, as they do in this case at page 20, but I am a very peculiar person. When I am quoted I like to be quoted accurately.

At the bottom of the very last page of their brief, footnote 36, they refer to the lectures that I gave at the University of Buffalo Law School, it is page 67, and they assert that I have taken the position that acquisitions are material.

Now let me read to your Honor what I said. I was reviewing—in this lecture I made some years ago, before there were any decisions, and all one had to deal with were the complaints filed by the government, Department of Justice and the Federal Trade Commission. I analyzed those complaints, and I said, after reviewing a lot of complaints:

"Some of the cases appear to be an attack on business [fol. 3491] pure and simple, without regard to any anti-competitive effect. Some rest squarely upon quantitative substantiality. In several considerable emphasis is given to the history of prior acquisitions, as though that factor in and of itself might be decisive."

This is the quotation on which they rely in telling your Honor that I heard in my writing affirmed the relevance and materiality of prior acquisitions.

I say, your Honor, that these three documents are plainly irrelevant and immaterial in the context of the present case. I don't have to deal with what the situation would be elsewhere.

Now the two other documents have further infirmities. 788 is a resolution of the board of directors of Continental Can, which recites that the chairman indicated to the board that he had been in negotiation with two glass companies, and that if his negotiations could be successfully completed Continental would acquire one or both of these companies.

[fol. 3492] The Court: Is this before the Hazel-Atlas merger or not?

Mr. Handler: It was contemporaneous. It was May 16, 1956. It was before.

The Court: I presume, though I am not trying to read something in there, that one of these was the Hazel-Atlas Glass Company.

Mr. Handler: One was the Hazel-Atlas Glass Company. And the board told him to go ahead with his negotiation.

The Court: I have read that, and I don't understand what the significance of that is, frankly. Everybody knew they were going to get the Hazel-Atlas Glass Company, and plainly, they wouldn't possibly acquire the Hazel-Atlas Glass Company without the chairman telling them there were some negotiations on the fire.

Mr. Handler: Well, the purpose of this, your Honor, is a sentence in G-900, the file exhibit, and here I think your Honor will find that not only is the government offering [fol. 3493] evidence which is irrelevant, but it is doing something which you and I would not do, and something which we would personally not be very proud in having others do.

In this letter which was submitted to Judge Hansen, who was then the head of the Anti-trust Division, and signed by the Willkie firm, the statement was made that:

"Continental has asked us to inform you in the strictest confidence that it is carefully considering the business of Obear-Nester Incorporated, East St. Louis, Illinois, including its subsidiary, Lincoln Container Company, to supplement the lines of Hazel-Atlas. The concern is primarily a beverage bottle manufacturer with combined net sales in '54 and '55 of around \$15,000,000 and \$14,000,000 respectively. It is our intention to discuss the matter with you fully before proceeding with the acquisition."

Well, the acquisition never went through.

The Court: Were there any discussions, or what happened? [fol. 3494] Was the trouble about Hazel-Atlas which made any such conferences inadvisable, or what happened?

Mr. Handler: The negotiations failed for other reasons, your Honor.

The Court: All right.

Mr. Handler: Now, this is a fortiori. To offer evidence of acquisitions which never occurred, which were merely in contemplation, certainly that is not history.

The Court: It is not history. It seems to me the only thing that would bear on was intent, and as I understood it there is no question of intent in this case.

Mr. Handler: There is no question of intent in a Section VII case. We are held accountable for the consequences of our acts. Continental Can did not act as a sleep walker. It consciously bought this company.

Now Mr. Greenberg in his brief refers to the Supreme Court decision in DuPont-General Motors, where DuPont tried to bring the purchase, that it had made some decades [fol. 3495] before the Supreme Court ruling, of General Motors stock within the investment exception of old Section VII, which is continued in the new version of that statute. It was in connection with whether or not the stock had been bought for investment that the court considered General Motors' intent.

Obviously, the intent with which you buy stock, whether you are buying it to control an enterprise, or whether you are buying it for an investment, is necessarily material to the investment exception. That has nothing whatever to do with the present case, where intent is obviously of no consequence. If this acquisition substantially lessened competition, we could bring in a thousand witnesses here, telling you what wonderful guys we are, and you would hold all of it immaterial, and if the acquisition does not substantially lessen competition, our state of mind is immaterial. It has been no issue in case whatsoever.

[fol. 3496] For all of these reasons, your Honor, and I thank you for indulging me in what has been, I fear, an excessively long argument, we say that these documents should be rejected. They are not material, they are not relevant.

In addition, the chart in G-800, we believe, is misleading for the reasons brought out in Mr. Johnson's cross-examination.

The Court: Well now, Mr. Greenberg, it is now 4:30, and I don't think, in considering the fact that I have heard a substantial number of words from a substantial number of people today, I don't think it is fair even to you or to me to

hear you on this question this evening. I take it you want to be heard at some length.

Mr. Greenberg: My discussion might encompass a few minutes less than Professor Handler's, but it might be fairly lengthy.

The Court: All right. Now I will tell you what I will do. I will read what I describe as your belated memorandum tonight and I will hear you on this question in the morning, [fol. 3497] and probably make my rulings after I hear you, and anything further which Professor Handler may briefly wish to say to me.

Apart from that, we have these additional documents, which number, as I understand it, somewhere around a hundred. I directed that counsel confer on that on Friday, or over the weekend, in an effort to determine how many were being introduced simply for the purpose of showing what I would succinctly refer to as an awareness, and how many were for more general purposes.

What was the result of that conference?

Mr. McManus: Your Honor, we indicated to Mr. Hughes that only I think four or five, or at the most, six—I forget the number, but a very small number—were going to be offered for other than awareness. Now, of course, I would like to define "awareness" when I get to it.

The Court: Oh, I understand that.

Mr. McManus: You understand that.

Another thing. Since that time, your Honor, I have gone [fol. 3498] over these documents, some additional, which I think I will not offer because they are cumulative, and also I hoped in the morning, where we have bulky documents, to indicate that we are only offering maybe the first four or five pages.

The Court: You had better do that, because if you are going to offer reading material by the ream, you are going to have to be awfully selective in offering, because I am just not going to read a lot of bulky documents unless I have some reason to read it.

Mr. McManus: I understand that, and that is why I have that job about 90 per cent completed, and I would have it completed in the morning. So that I think the time spent in that should not be of considerable length.

Mr. Hughes: Well, I only want to say this: Mr. McManus

told me today that he thought that if I were to spend another 10 or 15 minutes with him, that he could draw a line through a lot of these exhibits, which would mean to me that they [fol. 3499] are not even being offered at all. To the extent that we could do that, why, that is fine.

The Court: That is all to the good.

Mr. Hughes: That is all to the good.

Mr. McManus: Surely.

Mr. Hughes: I do think that your Honor should be aware that even though it would appear now they were to be offered for a limited purpose, there are some of these documents as to which we have additional grounds for objection, I don't know, the objection that we have been making to that whole awareness concept.

The Court: Yes.

Mr. Hughes: And therefore, even though this will help, to some extent, to expedite it, I feel that we will have to go on a document by document basis.

The Court: Well, I am simply trying to visualize what we are going to get into tomorrow. I should say it is quite plain that assuming the government rests some time tomorrow, when the government rests we will take an adjournment [fol. 3500] for the day and we will begin with the argument on the motions the following day. I should assume that we will not be taking the whole day tomorrow.

Mr. Hughes: Your Honor, I think that as with any long case, as you draw near the end of it there are what I would call tag ends. We do have one or two tag ends that we want to draw to your Honor's attention.

The Court: All right.

Mr. Hughes: They will take only moments, as I say.

The Court: That is all right. Let's get all the loose ends and tag ends and bobtail and whatnot cleared up tomorrow, and get this package, which is called the government's case, buttoned up.

Mr. Greenberg: Your Honor, I have only one comment to make, if Mr. Hughes will permit me.

You indicated that you intended to read our brief tonight, and of course we are quite elated over that. I would like to add, however, that after having listened to Professor Hand [fol. 3501] for such a long period of time, I believe he suggested further arguments and amplifications of our

brief, which will be presented in oral argument. I hasten to add that.

The Court: I am not going to limit you by your brief. I will hear you, don't worry about that.

Mr. Hughes: Your Honor, may I just say this, that it would be helpful, I think, and expedite matters if Mr. McManus could tell me tonight which of these exhibits he is going to contract and only offer limited portions?

Have you said that your work on that is 90 per cent complete?

Mr. McManus: I intend to do that, and I hope before the evening is out I will have more.

The Court: All right, you confer and cut out as much as you can by conference.

Mr. McManus: I will.

The Court: Very good. Goodnight, gentlemen.

(Adjourned to October 18, 1960, at 10:30 A.M.)

[fol. 3502] New York, October 18, 1960, 10:35 A.M.

Trial resumed

The Court: All right, Mr. Greenberg, we will hear you on the question of the prior acquisitions.

Mr. Greenberg: Thank you, sir.

If the Court please, the process of determining what is not relevant and what is not material is essentially one of considering what should be rejected completely and finally from this litigation.

The defendants, by their objections, would have his Honor reject for all purposes any evidence relating to the past acquisitions already in the record or to come. The defendants would have us reject evidence in the record which relates to the acquisition of the White Cap Company. This [fol. 3503] company was purchased on January 4, 1956. Its position as one of the industry leaders in the sale of vacuum caps and in the development of capping machinery cannot objectively be subject to serious dispute. The vacuum cap is an integral part of the glass container in many segments of the food industry.

The specific relationships between the things produced by the White Cap Company and the glass containers of Hazel-Atlas have been the subject of abundant testimonial and documentary proof. The White Cap acquisition, when viewed in the context of the Hazel-Atlas merger, has placed smaller glass container manufacturers in a position where their development into serious and substantial competitive threats has been impeded by their opponent's full line advantages.

Concomitant with this, such acquisitions serve to deter the entrance of new substantial capital into the market.

In Government's Exhibit 900, for identification the defendants indicate that after the Hazel-Atlas acquisition they were contemplating the purchase of the Obear-Nester Glass Company.

[fol. 3504] Before the Court is this situation: Continental Can acquired the White Cap Company. A few months later the Hazel-Atlas Glass Company contemplated the acquisition of still another important competitive factor in the glass container industry. This situation, we say respectfully, necessitates intervention by the Court.

The Court: Now, I am a little baffled. I don't want to confuse two things. You talk about the acquisition of the White Cap Company as one of the prior acquisitions. You also talk about possible plans that the defendant may have had in the future for the acquisition of another glass company, which never came off.

Mr. Greenberg: That is correct.

The Court: In other words, they were talking about the acquisition of another glass company. It seems to me that these two things are quite different, and that prior acquisitions are one thing, but prospective plans which never came off are something quite different, unless you are going to say that we are dealing with intent as an important element in this case.

Is that your position?

Mr. Greenberg: Your Honor, our position is this: We [fol. 3505] agree with your Honor that the occurrence of the White Cap acquisition, and on its heels, the Hazel-Atlas acquisition, would be enough to support our argument with respect to full line advantages, and other arguments which I will develop in my argument. To that extent we agree with his Honor.

With respect to the Obear-Nester Glass Company, we say that there is language in some of the cases which indicate a fear of a chain reaction of acquisitions which might result from upholding the legality of an acquisition under consideration, and we bring the contemplated acquisition of Obear-Nester to your Honor's attention for whatever value he may find.

[fol. 3506] The Court: I am frank to say, quite apart from the other question of prior acquisition, I see very little, if any, significance in a contemplated acquisition—I say a contemplated; I don't even know how it is contemplated. There is one exhibit which talks vaguely about the possibility of perhaps acquiring some glass companies, one of which was plainly Hazel-Atlas, but it does not seem to me that that has any significance in the picture, nor is it of any evidentiary value, unless you are talking in terms of the defendants' intent to do certain things, and I had understood that it was early stipulated here that intent was not a part of this lawsuit.

Mr. Greenberg: If the Court please, I had intended to deal with that question later, but I will deal with it now.

The Court: Don't let me interrupt the thread of your argument. We will take it up again when we come to it.

Mr. Greenberg: I might as well do it now.

We would like to direct your Honor's attention, on the question of intent and the acquisition of companies, to United States v. Columbia Steel Company.

[fol. 3507] The Court: First of all, you have got to get over one hurdle, it seems to me, and that is that I have a very clear recollection that during the course of the pretrial in this case it was stipulated on the record by the government that intent was not a part of this case.

Mr. Greenberg: Your Honor, I do not recollect exactly the wording—

The Court: And I am not going to permit, at this stage, if intent was not a part of this case in the pretrial, intent to be dragged into this case now.

Mr. Greenberg: If I may continue, your Honor.

The Court: Yes.

Mr. Greenberg: Section 7 of the Clayton Act has always been directed toward retardation of a cumulative process

which threatens to have serious anti-competitive consequences.

Professor Handler disagrees with this assertion.

Referring to pages 4 and 5 of the defendants' June brief which dealt with prior acquisitions, he argues that [fol. 3508] since the statute by its terms does not require a consideration of prior acquisitions by its "plain meaning," that therefore a court should consider them irrelevant and immaterial. Realizing, however, that such an argument may appear unreasonable to his Honor, Professor Handler abandoned such an argument in the middle of page 5 of the June brief for the assertion that the government has misconstrued the cumulative effect language of the House report.

We are told and instructed that what the language really means is that, since each merger is now subject to the Clayton Act before it reaches illegality of the type condemned by the Sherman Act, we need not consider any other acquisitions but the one in question.

First, we would like to agree wholeheartedly and completely with part of Professor Handler's thesis. We agree with him that Clayton Act standards and Sherman Act standards are at different poles. We shall agree with him on this point throughout this litigation. That this distinction between standards justifies the ruling out of prior acquisitions is a startling theory, but the fact that such an [fol. 3509] assertion is startling and unique does not make it credible, sensible or acceptable.

Our point is that if the Hazel-Atlas merger is looked at in a vacuum and not in its true sense, then how can we determine whether this is one of a series of acquisitions which is causing harm to the competitive vigor of our economy in the manner I have described earlier?

The next prior acquisition to be discussed is that of the Elmer Mills Corporation. This company was purchased in 1953. It has always been and today is one of the industry leaders in the sale of plastic containers to the cosmetic, drug, household and chemical industries.

The competitive relationships between and among can, glass and plastic containers have been amply demonstrated for his Honor.

To acquire a substantial enterprise in the plastic container industry in 1953, and then to follow it up three years later with the acquisition of a leading glass container company operating in the same fields reduce the vigor of competition across industry lines to the detriment of buyers of containers for drug, cosmetic, household and chemical products.

[fol. 3510] Moreover, the joinder of two such competing companies has the result of placing smaller container manufacturers in a position where their development is hindered by their—

The Court: Let me ask you a question here. Let me interrupt you again.

What do you say is the difference, or what added significance is there from the fact that the plastic company, which was acquired in 1953—in other words, what difference does it make, assuming that at the date of the Hazel-Atlas merger the Continental was engaged in the plastic container field substantially; what difference does it make whether they went into that field on their own or whether they went into that field by an acquisition in 1953?

Mr. Greenberg: Well, I think the 1953 date is significant because the plastic container industry began its growth, it began to become a successful competitor to cans and glass containers. The plastic container industry, as your Honor knows from the testimony in the record, is a virgin industry, it is a new industry, it is a new source of competition [fol. 3511] to can and glass container manufacturers.

The fact that Continental acquired its way into the business instead of building a new company, we think is significant because the legislative history places an *anethma* on acquisitions as opposed to building new plants, because when this is done you are not only eliminating a competitor, you are buying know-how, you are buying customers and placing other container manufacturers in a position where their development is hindered.

The Court: But you are not in this lawsuit, Mr. Greenberg, in any way critical, as I understand it, of the action of Continental in acquiring this plastics company in 1953. That also has been stipulated on the record.

Mr. Greenberg: I am sorry, your Honor, I don't understand.

• The Court: In other words, the government is not attacking or, indeed, claiming that the action of Continental in 1953 in acquiring the plastic companies is in any way illegal. That has been certainly stipulated on the record in the course of our pretrial discussion.

[fol. 3512] Mr. Greenberg: I think that perhaps is correct, sir, but I do not believe that that forecloses inquiry into mergers of this type. The fact that a merger was legal in 1953 and is legal now I think still can be inquired into in a situation where we are alleging that the Hazel-Atlas acquisition, by virtue of its relationship with the prior acquisition, creates a situation, an evil situation, to use the words of the DuPont-GM case, and for that reason we believe that these prior acquisitions, among other reasons, are relevant.

Just for the record, when you would ask me about whether we considered intent relevant in a suit of this nature, whatever we said in the past may have been ambiguous, but what we meant to say was that we believe that bad intent on the part of the acquiring company is relevant but that good intent on the part of the acquiring company is not.

The Court: I want a record reference to that because this is quite different from what my conception of the stipulation is. Has anyone got a record reference here?

Mr. Handler: May I interrupt, your Honor?

[fol. 3513] The Court: I would just like the reference.

Mr. Handler: The pretrial transcript, at page 309, the middle of the page.

The Court: Well, now, I am reading from the transcript:

"Let me interrupt you again. To what extent, if any, is the question of the intent or purpose of Continental Can in making these acquisitions of significance?"

"Mr. McManus: The intent, your Honor, is of no significance. There is no significance.

"The Court: Your position is that if these acquisitions had the effect or tended to have the effects you claimed for them, intent and purpose are of no significance either way?"

"Mr. McManus: That's correct."

Mr. McManus: Your Honor, I made that statement, and may I say something? I don't want to interrupt the presentation here. The government still stands behind that statement, and I am dealing only with this case of course.

The Court: Well, I am not asking you to do anything [fol. 3514] outside of this case. I am interested in this case at the moment; that is all.

Mr. McManus: That's right.

Now, your Honor, the only thing I would like to say, the fact that Continental Can's board of directors decided that they can buy two companies has nothing to do with their intent after they acquired the company.

We are not arguing that they had bad intent or good intent in buying Obear-Nester. We just say that they had permission from their board of directors to buy another company, and were in the process of buying. We put no onus on their intent in what they were going to do with Obear-Nester and in attempting to affect the industry. Your intent only comes up after you have made your acquisition.

We are just trying to show by this document that they were in the process of not only buying Hazel-Atlas but were moving on to the next step to buy Obear-Nester. We do not allege that there was either a good intent or a bad intent to use or misuse Obear-Nester.

I would say that bad intent could be a factor, but we are [fol. 3515] not using that in this case, your Honor.

The Court: Well, it cannot be a factor now in view of the stipulation, and the stipulation in the pretrial, and that was as long ago as June 9th and 10, 1959.

Mr. McManus: That is absolutely correct, your Honor, and we still stand by it.

I think what Mr. Greenberg was trying to point out was that it could be, but it is not a factor in this case.

The Court: All right.

Mr. Greenberg: I had been discussing the Elmer Mills acquisition when I interrupted the train of thought on the question of intent, so I will try to continue now.

I had just finished discussing the proposition that the joinder of two such competing companies has the result of placing smaller container manufacturers in a position where their development is hindered by their opponent's

full-line approach. This has the concomitant result of discouraging the entrance of substantial new capital into the container industries affected.

Continental Can has made many other acquisitions over [fol. 3516] the years. In 1944 it purchased the Bond Manufacturing Company or Corporation. They produced crown caps and cork products. There has been evidence offered of the relationship between crown caps and narrow-neck beverage bottles. Our arguments with respect to the relevancy of this acquisition is the same as those asserted for the White Cap acquisition.

Continental Can has also purchased companies producing paper containers and paper products. In this field they have bought companies producing composite containers, fiber drums, paper containers of various types, as well as the companies producing the raw materials which are used in manufacturing these containers.

In addition, their acquisition program has reached the companies producing can-making machinery, laminated bags, and flexible packaging.

In its earlier years it acquired many admittedly substantial metal can companies. This can be ascertained from the comments contained in G-786, and I refer his Honor to page 7 of G-786, which discusses the U.S. Can acquisition. [fol. 3517] The Court: All right.

Mr. Greenberg: Other references, your Honor, which I state in passing are to pages 9 and 11 of G-786, those portions which deal with the Southern Can Company and the Wheeling Can Company. All of these acquisitions, which are cumulative in nature and which encompass many years, discourage and prevent the development of companies operating in the can, glass and plastic container industries.

The defendants offer a substitute for competition from such companies. At page 14 of G-900 it is said:

"Many products now use or can use a variety of different types of packaging. Thus, it is the policy of Continental to encourage its various individual product divisions to push their own particular type of packaging to maximize customer service volume and profits."

And the following part, your Honor, is the part I wish to emphasize:

"This results in strong intra-company competition, which in many instances is more effective than outside competition in bringing about the adoption of improved products, cost reductions and better service to customers."
 [fol. 3518] The government rejects their substitute as not being consonant with the principles of our capitalistic system.

In drawing near to the close of our argument there are certain points which we believe should be made to make our overall position crystal clear.

Point number 1: We do not and cannot, as responsible officers of the court, suggest that Continental Can or any other company cannot diversify or integrate. This would be a reckless argument. Perhaps if the defendant's acquisitions were fewer and less significant over the years there would be no argument today on the relevancy of prior acquisitions.

Point number 2: Mr. Handler referred to a few seemingly unrelated acquisitions as being included in G-785 and G-786, and the graphic chart which portrayed certain of the defendant's prior acquisitions. We do not deny that there are unrelated acquisitions included in these exhibits. They were left in to show that out of all the acquisitions made by Continental Can over the years just a few were unrelated to the arguments we assert. Mr. Handler did not mention certain Canadian acquisitions described in G-786. These are also unrelated. There are ten unrelated acquisitions [fol. 3519] in G-785 and G-786, and they are as follows: The Reynolds Molded Plastic Company is unrelated; and so are the Dixon Manufacturing Company, Bowes Industries, Tencó, Inc.; Cannonsburg Coal Company; Metal Box and Printing Industries; Whittall Can Company, Ltd.; Colonial Cannery, Ltd.; Mono, Ltd. of Canada; General Steelwares, Ltd., McDonald Division.

With these mergers eliminated from the case, your Honor, let defense counsel and the government join issue on such past mergers as the U.S. Can Company, the Southern Can Company, the Wheeling Can Company.

The Court: Well, now, you say "join issue." That again puzzles me, Mr. Greenberg. What are you joining issue on? You are joining issue with respect to, let's say, the merger of United States Can Company, whenever it was,

in 1920? Are you claiming that there is anything illegal, either in the statutes at the time or in the Clayton Act, in the merger in 1920 of Continental and United States Can?

Mr. Greenberg: We are not saying these companies were acquired illegally. We don't know, frankly. As far as we know they were not acquired illegally. We are saying [fol. 3520] this is part of a cumulative series of acquisitions which have covered cans which competed with the cans of Continental, inter-industry competitors, such as the Hazel-Atlas Glass Company, supplemental packaging items, such as the vacuum closure in the Crown cap, and other types of packaging items described in G-785 and G-786, such acquisitions as the White Cap Company, the Elmer Mills Company and the Bond Manufacturing Company.

What now are defense counsel's arguments when we focus on acquisitions of these kinds with their characteristics?

I have nothing further, your Honor, at this point.

The Court: Do you wish to be heard further, Mr. Handler?

Mr. Handler: Just really very briefly, your Honor.

I must confess that I am totally at a loss to understand what a stipulation, solemnly made by the Government of the United States in a lawsuit, means in light of the argument that your Honor has just heard. At pre-trial you were told unqualifiedly that there was no attack upon any [fol. 3521] of the prior acquisitions. Mr. Greenberg now tells you, in response to your question, that he doesn't know whether these acquisitions were legal or illegal. I don't know what his words mean. I have heard them all, and I thought I understood the English language.

But he tells you that the can company acquisitions back in the '20s prevented the development of new companies in the can and glass industry. I don't know where that comes from. I heard no such evidence, and I have attended every day of this trial, and I have read the record and I have read all the exhibits. That is a matter of evidence.

Also, it seems to me that it is an attack on the prior acquisitions, if they had that effect. He has made the same kind of an attack upon the Mills acquisition and on the White Cap acquisition, all, I think, in total disregard

of the solemn assurance your Honor was given at pre-trial that no effort would be made to attack the legitimacy of the prior acquisitions.

Now, he also has, I think, compelled your Honor to exclude the chart in G-800, because he has told you that this is a misleading chart. Its title is "Domestic acquisitions [fol. 3522] of Continental Can Company in the container and related product field," and he has listed all the acquisitions that do not fall within that title.

Now with respect to everything that he has had to say about full line advantages, chain reaction, and the like, I intend to cover that fully in my argument on the motion to dismiss, because that has to do with the evidence that is in this record, as contrasted with counsel's decisions.

Thank you, your Honor.

The Court: Let me see Exhibit 800, will you please?

On this question of prior acquisitions, I am not persuaded that the evidence of prior acquisitions is irrelevant and immaterial. I am, on the other hand, not persuaded that the relevancy and materiality of that evidence is anything more than the admission of a certain amount of historical background. As historical background I think the evidence may or may not throw some light upon the operations of Continental Can and what has happened through the years in terms of the operation reaching the point which they did. At the present time I view the evidence only in that context, and I do not think in a case of this character [fol. 3523] prior history of the company in question can be considered to be irrelevant and immaterial, and thus excluded.

Beyond that at this stage I do not go. We are certainly not getting into any question of intent here. (There isn't any intent question in this case, because the government has said so, in so many words. We are not getting into the question of whether the prior acquisitions were or were not illegal. As I understand the stipulation of the government, there is no attack on the prior acquisitions. But that does not go so far as to say that they may not have some relevance or materiality in terms of an understanding of the operations of the Continental Can Company in the light of its historical background.

For that reason I am going to admit Exhibits 785, 786 and pages 13 to 34 of Exhibit 900.

Mr. Greenberg: Your Honor, we offered pages 8 through 34.

The Court: 8 through 34, all right.

As a matter of fact, if Continental should take that position, I am perfectly prepared to consider any suggestion by them that we admit the whole letter, which is Exhibit 900, [fol. 3524] Mr. Greenberg: If the Court please, if pages 1 through 7 are admitted, we would like to make it clear that pages 1 through 7 contain self-serving legal discussions which we simply do not agree with and we would hope that your Honor would find it—

The Court: Well, I think that if Continental thinks it made its position with respect to this whole subject matter clear in the letter to Judge Hansen, they are entitled to have their entire position placed in the record and not merely parts of it, if they want it.

Mr. Greenberg: I just, respectfully, your Honor, did want to make it clear that the government was not offering pages 1 through 7.

The Court: Well, the point is that if Continental takes the position that, assuming that the pages that the government offers go in, the whole letter goes in, then I will consider such an application by Continental. I haven't read the previous pages; I don't know what is in them.

Mr. Handler: Your Honor, you anticipated very properly the point I was going to make. We feel that if the government offers part of the letter of this sort, the doctrine of [fol. 3525] completeness would require that the entire letter be offered by the government.

The Court: Well, then, you object to that, Mr. Greenberg?

Mr. Greenberg: I most certainly do, your Honor. We don't think the law of evidence reads that way.

The Court: Well, I do.

Mr. Greenberg: Well, I did want to say, I am talking about whether we have to bring it in as part of our exhibit, not whether it goes in. That was the point that I was addressing myself to.

The Court: I don't say you are offering it. All I say is that it seems to me very fundamental business that if

you offer parts of a letter as alleged admissions against interest, you have got to have the rest of the letter; you have got to have the good with the bad and you can't pick out a part of it and say, "We are going to take this and we are not going to let the rest of the explanations go in."

Mr. Greenberg: I just did want to make my point clear. I was addressing myself to whether we were making it part of our exhibit.

The Court: Well, the point is, in any event 900 will go in [fol. 3526] in its entirety, so as to give me the entire picture. 785 will go in in its entirety. 786 will go in in its entirety.

(Government's Exhibits 785, 786 and 900 received in evidence.)

The Court: Now, that leaves us with two other things. That leaves us with 788 and also with 800, whatever the chart number is. Is it 8 or 9?

Mr. McManus: 8, your Honor.

Mr. Johnson: 8.

The Court: As far as 788 is concerned, I am going to let it in. I think it is of no value and doesn't make the slightest difference either one way or the other. I think it might just be in to complete the record. I can't think that it does anybody any harm. Although that is not a good method of admitting evidence, I will admit it.

(Government's Exhibit 788 received in evidence.)

The Court: In so far as the chart is concerned, it seems to me that the chart is mislabeled, and I am not going to admit in evidence a mislabeled chart. It says "Domestic acquisitions of Continental Can Company in the container and related product field"

[fol. 3526a] Mr. McManus: Your Honor, could I address myself to that, if I may?

The Court: Yes.

Mr. McManus: Your Honor, that may be right, and I am not strongly urging that this document go in. However, I would like to say this: it was compiled, I believe, from the underlying data that you have admitted, and insofar as aiding the Court in understanding, we would be willing—

[fol. 3527] The Court: Well, I will tell you what I will do with you. If you physically strike from that exhibit the words "in the container and related product field," I will let the exhibit in evidence as a mere listing of what is contained in these other exhibits for purposes of convenience and nothing more.

Mr. McManus: Now, may I suggest—

The Court: What do you say to that, Mr. Handler? Or Mr. Johnson?

Mr. Johnson: Cross examination indicated that the side headings were misleading. There are categories at the side. If we start amending the table it is going to be a different thing entirely, and it seems to me that with the indicated change on it it has no probative value whatsoever.

The Court: Well, in many cases, Mr. Johnson, a tabulation has no probative value standing by itself. It is merely a convenient form of viewing certain information.

I do not indicate here that this chart has any probative value standing by itself. It is merely a listing of some things that happen to be in evidence.

[fol. 3528] Now, you say that it is also inaccurate in the categories on the left-hand side, do you?

Mr. Johnson: Yes, sir. If you will look at the second one, glass and plastic containers, and under the heading "1940s" there is Reynolds Spring Company. Mr. Greenberg just now said that Reynolds had no relation to the container industry at all.

The Court: What is Reynolds, do you remember?

Mr. Johnson: I think it was a bomber parts company that was acquired during the war.

The Court: Well, if that is so, and there are certain inaccuracies of that nature in here, I am not going to admit the chart.

Mr. McManus: That is all right, your Honor.

The Court: I will exclude it.

Mr. Greenberg: Your Honor, I did want to make one point before we left these various documents, and that is that we are offering, as I believe your Honor recalled, G-900, pages 8 through 34, for all purposes.

Mr. Handler: I didn't hear that.

[fol. 3529] The Court: He says he is offering pages 8 to 34 of Exhibit 900 for all purposes.

Mr. Handler: We have no objection, your Honor.

The Court: All right.

Mr. Handler: Your Honor, just in the interest of a clear record, am I correct in understanding that you have admitted 785, 786 and 788 for the limited purposes which you articulated in your ruling?

The Court: That's right.

Mr. Greenberg: If the Court please—

Mr. Handler: One further point—

Mr. Greenberg: May I just address myself to that point? We are offering 785 and 786 for the truth of the facts stated therein, and we would hope that we could cite any facts contained in those documents as what is the case and as what was the case.

The Court: These facts are in the record as facts presumably. The question we are dealing with now is the significance to be attached to those facts from an evidentiary point of view. That does not destroy their validity as facts.

Mr. Handler: Mr. Greenberg, your Honor, renewed the [fol. 3530] offer of 900 to pages 8 through its conclusion when he asked that it be admitted for all purposes.

Would your Honor indicate the basis upon which you are admitting the first eight pages?

The Court: Yes. The first eight pages will be admitted for all purposes too.

All right, now, gentlemen, where do we go from here?

Mr. Hughes: Your Honor, I had indicated that there were a few matters that I thought we could address ourselves to before Mr. McManus went to his documents, and the first, your Honor, is to remind your Honor that on June 15, 1960, we offered in evidence as our Exhibits B-1, B-2 and B-3 the annual reports of the Owens-Illinois Glass Company for 1953, 1954 and 1959, and at that time Mr. McManus indicated that he wanted to have an opportunity to look at them before he indicated whether he would have any objection, and then somehow or other the whole subject got lost in the shuffle, and in going over the record this was one of the things that we wanted to dispose of.

The Court: Have you any objection to those?

[fol. 3531] Mr. McManus: The only thing I would like to

have is the purpose of the offer and then I am sure I have no objection.

Mr. Hughes: We offered them in connection with the testimony of Mr. Levis. You will recall Mr. Levis testified to—

The Court: He testified at some length as to the operations of Owens-Illinois.

Mr. Hughes: That is right, as to its earnings, and sales, and that sort of thing, and it is offered by way of illumination of his testimony.

Mr. McManus: ~~We~~ have no objection.

The Court: It may be received.

(Defendants' Exhibits B-1, B-2 and B-3 for identification received in evidence.)

Mr. Hughes: Your Honor, may I pass to another subject?

The Court: Yes, please do.

Mr. Hughes: One thing, your Honor, that we felt should be clarified before the plaintiff rests was the posture of the case before you as relates to the pretrial proceedings.

We had felt, and we wanted to be sure that we were [fol. 3532] correct in our feeling, that the proceedings before you in pretrial were before you in considering the motion to dismiss. I have in mind such things as your pretrial orders and rulings, stipulations or agreements of the parties—

The Court: Well, such as the stipulation, or the part of the transcript that we referred to this morning.

Mr. Hughes: Yes, that is correct.

The Court: I would assume that—in fact, I have assumed—the pretrial record in a non-jury trial of this nature is a part of the record as a whole and must be considered together with the evidence in connection with any motions.

I take it there is no disagreement on that; is there, Mr. McManus?

Mr. McManus: No sir, your Honor.

The Court: All right.

Mr. Hughes: Mr. Johnson has a matter to dispose of.

The Court: All right.

Mr. Johnson: After your Honor's ruling yesterday with respect to the documents, there were two additional exhi-

bits which I had had marked for identification, portions [fol. 3533] of which I wanted to offer and I overlooked it at that time.

The first are pages 16 and 135 of Defendants' Exhibit GG for identification.

The Court: Which is what?

Mr. Johnson: Which is United States Treasury publication on statistics of income, 1956-1957.

The Court: That is one of the documents you used on cross examination?

Mr. Johnson: Yes, sir.

The Court: Any objection to that?

Mr. McManus: If he is offering it for the purpose of explaining his cross examination—is that what it is?

Mr. Johnson: Yes, sir.

Mr. McManus: I have no objection.

The Court: All right. Received.

(Pages 16 and 135 of Defendants' Exhibit GG for identification received in evidence.)

Mr. Johnson: And the second one offered for the same purpose is page 22 of HH for identification, which is a similar Treasury Department publication, statistics of income, 1957-58.

[fol. 3534] The Court: In other words, it is the next volume of the same series.

Mr. Johnson: Yes, sir.

Mr. McManus: No objection.

The Court: All right. It may be received.

(Page 22 of Defendants' Exhibit HH for identification received in evidence.)

Mr. Hughes: Your Honor, on June 17 we offered Defendants' Exhibit F, which was a brief schedule of dates of certain price increases. That was offered, you may recall, at the end of a day.

The Court: I don't recall, Mr. Hughes.

Mr. Hughes: We want to withdraw that exhibit, unless there is—

The Court: Was it admitted?

Mr. Hughes: It was admitted subject to Mr. McManus' consideration of it, yes. It was admitted subject to any—

Mr. McManus: It was admitted subject to my motion to strike, your Honor, and it was used in the cross examination of one of our witnesses, and I don't think that this exhibit should be withdrawn.

[fol. 3535] Mr. Hughes: That is all right.

The Court: All right, we will let it stand.

Mr. Hughes: I think, your Honor, that covers the items that we wanted to call to your attention.

The Court: All right. Now, Mr. McManus, are you prepared to go ahead now on the documents, or would you like a couple of minutes to get the documents arranged physically?

Mr. McManus: Your Honor, I believe that I am as well prepared as I would be five minutes from now.

The Court: All right. Let's go right ahead.

Mr. McManus: Of course, with a number of these documents you sometimes get a little bit confused, but I have explained to the defendants as much as I could, or at least thought I could, the documents that we will attempt to offer, and also the limitations that we put on those documents.

Now, your Honor, I have Government's Exhibit 1209 for identification, which is notice and proxy statement for [fol. 3536] special meeting of common and preferred stockholders of Continental Can Company, Inc., to be held October 26, 1956.

The Court: What is that—on the merger?

Mr. McManus: This was on the merger, but it outlines a great deal of the operation of Continental, Hazel-Atlas and Robert Gair, and as such I think that it does have a bearing on this case. It took place approximately a month after the Hazel-Atlas acquisition.

The Court: Yes, Mr. Hughes.

Mr. Hughes: Your Honor, in the first place, let me say that I thought that it was clear that we were trying only the Hazel-Atlas case and not the Gair case. Beyond that, your Honor, it seems to me that there is an enormous amount of this material that is now being offered that could have no conceivable relevance here, and in the interest of keeping our record down and sticking only to relevancy, I would think that Mr. McManus could indicate those portions that he really intends to rely on.

The Court: That would seem so to me. Have you got a copy of that, Mr. Hughes, or Mr. McManus?

[fol. 3537] Mr. McManus: Yes, your Honor (handing).

Mr. Hughes: And also the purpose of them, too.

The Court: For instance, here is a summary of the terms of the Robert Gair merger. Now, what in heaven's name has that got to do with this lawsuit?

Mr. McManus: Your Honor, we are willing to strike that out.

The Court: The purpose of the meeting—if you take the position that in this document there are certain things that you consider admissions against interest on the part of the defendant, I am willing to consider them, but it does not seem to me, and I have gone through—here is a great description of the Gair Company, which goes on for some pages, and then there is item 4 about the business of Continental. Now, it is Continental's description of its own business. It may conceivably be relevant and material here. I can understand that. Perhaps Continental's summary of its earnings. I don't know whether the range of security prices has anything to do with this case or not. I imagine that it does.

[fol. 3538] A lot of stuff about the records of Gair and remuneration of them: has that got anything to do with this lawsuit?

Mr. McManus: Perhaps I should withdraw the reference there to the agreements with Gair and matters of that sort.

The Court: Why don't I suggest this at the moment: that you offer section 4 and section 5. Do you want the capital stock of Continental described? Have I got anything to do with that?

Mr. McManus: We will offer that portion now, your Honor, and if I could have five minutes I will—

The Court: In other words, we will take some relevant portion of this and let's try and agree to cut out all the stuff that isn't relevant.

Mr. McManus: Your Honor, the government—

The Court: I take it, Mr. Hughes, you have no objection.

Mr. Hughes: To 4 and 5, your Honor, no.

The Court: You have no objection to those two?

[fol. 3539] Mr. Hughes: No, your Honor.

Mr. McManus: Now, your Honor, the next government exhibit is Government's Exhibit 1210, which deals with the notice of special meeting of stockholders of the Hazel-Atlas Glass Company, and outlines the acquisition of the Hazel-Atlas Glass Company and the business of Continental and the plants of Continental, the description of the companies and their earnings, and things of that nature. It is a typical notice to stockholders.

The Court: What do you say to that, Mr. Hughes?

Mr. Hughes: Here, again, your Honor, it does seem to me that there are some portions of this that really are not relevant, a description of the common stock, and—

The Court: Well, I think in this case, Mr. Hughes, it would be more time-consuming to eliminate than otherwise. I am going to overrule your objection and take that.

Mr. Hughes: Yes. All right.

The Court: 1210.

(Government's Exhibit 1210 for identification received in evidence.)

[fol. 3540] Mr. McManus: Your Honor, the government would like to offer Government's Exhibit 1211 for identification in evidence, which is the Continental Can Company's annual report for 1955; Government's Exhibit 1212 for identification, which is the Continental Can Company's annual report for 1956; and Government's Exhibit 1213, which is Continental Can Company's 1957 annual report. These cover the years just prior, including and after the Hazel-Atlas merger.

The Court: Any objection?

Mr. Hughes: Here, again, are you offering the entire document?

Mr. McManus: Yes. I think it is important to show the operation of the company, before, during and right after the acquisition.

The Court: Any objection?

Mr. Hughes: I have no objection, your Honor.

The Court: All right. They may be received.

(Government's Exhibits 1211 through 1213 for identification received in evidence.)

Mr. McManus: Your Honor, the rest of the documents [fol. 3541] that we are offering, we are offering them on the basis of the fact that Continental made them and that it was a pattern and a course of conduct of their company to make such documents, and that it showed their concern for other types of packaging material, principally glass.

The Court: Which is wholly on the awareness theory.

Mr. Hughes: Would you read Mr. McManus' last statement?

(Record read.)

The Court: Just let me have a description very briefly of what these documents are, and how many there are to begin with.

Mr. McManus: Your Honor, I don't have the exact number, but I believe there were 97 the other day, and I would think that we have cut them at least in half. On the bulky documents we have cut pages down considerably, as you had indicated that you would desire us to do.

The Court: Let me hear Mr. Hughes on this. He is familiar with the material, I believe.

Mr. Hughes: Yes. Your Honor, may I first say that I think it is going to help you your Honor, as we move along [fol. 3542] through these documents, if you had before you the stipulation that we entered into with respect to some of these documents. We have prepared a very lengthy stipulation which your Honor had before you when the documents of GCMI were being offered, and that stipulation said some things about some documents and other things about other documents, and our position is, your Honor, that if we go through these on a document-by-document basis, in the end we will save time because each one has certain different aspects to it.

So say that you can get to things like surveys where I think we can work out a pattern of procedure as to what Mr. McManus is offering and how much of the document really needs to go in.

The Court: Is the stipulation marked with an exhibit number?

The Clerk: Yes, your Honor. 804 or 805, I don't remember which.

Mr. Hughes: Your Honor, this happens to be a copy of it.

The Court: Fine.

Mr. McManus: Your Honor, we would prefer first to— I assume we will go through them one by one, which I [fol. 3543] think is probably the better way.

The Court: I think that will save time in the long run.

Mr. McManus: Yes. I refer your Honor to Government's Exhibit 401 for identification.

The Clerk: Your Honor, may I have a few minutes to get organized on these exhibits?

Mr. McManus: Yes, I think that would be a better idea.

The Court: Yes, I think we will take a few-minute break here so that you can get together with the clerk, so that the clerk can have this material ready for me.

Mr. McManus: Yes, your Honor.

(Short recess.)

[fol. 3544] The Court: All right.

Mr. McManus: Your Honor, unless you want me to do otherwise, I will indicate the document we are offering and the pages, and as I understand it you have the stipulation before you, and unless you want me to, I will not read what that stipulation says.

The Court: All right, I think that is just as well.

Mr. McManus: Your Honor, the government is offering Government's Exhibit G-401 for identification, and with respect to that document we are offering the cover page, entitled "The packaged syrups market and appraisal of metal containers competitive position," from the first page down through iii, which includes the cover page and three additional pages.

The Court: Wait a minute. I am trying to follow this. There is a title page, called "The packaged syrups market." Then there is a summary.

Mr. McManus: That's right, your Honor.

The Court: In other words, the first, the title page, and four additional pages, you offer.

Mr. McManus: That's right, your Honor.

[fol. 3545] The Court: Yes, Mr. Hughes.

Mr. Hughes: Your Honor, I object to it as irrelevant and immaterial. No proper foundation has been laid for

its reception. There is no proof of any circulation of the document outside of the company; no proof of any authority or offer to bind the defendant; no proof of any adoption or reliance on the document by the defendant; and on the further ground that there is no proof of their competition in any respect, and there is certainly no proof of any competition between Continental Can and Hazel-Atlas, and it has no probative value on the issue of whether this acquisition violated Section VII.

The Court: All right, objection overruled. It will be admitted for the limited purpose indicated by Mr. McManus.

(Government's Exhibit G-401 received in evidence.)

Mr. Hughes: Now, your Honor, it having been admitted, may I call your Honor's attention to paragraphs 3, 4 and 5, beginning at I.

The Court: "In the small size market," and so forth and so forth?

Mr. Hughes: Little i, I guess, little iii, I guess is what [fol. 3546] I should have said.

The Court: You are talking about the paragraphs—

Mr. Hughes: That are marked 3, 4 and 5, the first two sentences of 5.

The Court: Yes, all right.

Mr. Hughes: Your Honor, I think I should add the objection of incompetence, as to this document.

The Court: All right, overruled.

Mr. McManus: Your Honor, of course we would like to draw particular attention to paragraph 6.

The Court: All right.

Mr. McManus: The government also now offers, your Honor, Government's Exhibit 406 for identification. We offer the cover page, the contents and page 3, introductory page.

The Court: You are not going into the history of coffee.

Mr. McManus: We also offer, your Honor, pages 20 through 23.

Mr. Hughes: Again, for the same limited purposes as you have indicated, Mr. McManus?

[fol. 3547] The Court: Yes, everything from now on, unless Mr. McManus states to the contrary, I am assuming, is offered for the same limited purpose as 401.

Mr. McManus: That is correct, your Honor.

Mr. Hughes: Your Honor, I object to this document on all of the grounds urged in connection with Exhibit 401.

May I call your Honor's attention to the fact that in considering this document—I withdraw that remark, your Honor, and stand upon the objection.

The Court: All right, objection overruled.

(Government's Exhibit 406 received in evidence.)

Mr. McManus: The government, your Honor, offers G-407 for the same purpose, and in this case we offer the entire document, page 1 through 15.

Mr. Hughes: The same objection as to the previous documents, your Honor.

May I call your attention to the fact that this document relates to Savorlock Can, as to which there was testimony. I think it was the witness Cleaves who indicated—

The Court: It never came to pass.

[fol. 3548] Mr. Hughes: —it never came to pass, and it finally wound up in a shipment to South Africa.

Mr. McManus: I don't think the latter was testified to, because I have checked it, your Honor.

The Court: Well, I don't care much whether it ended up in South Africa, Timbuktu, or the Atlantic Ocean. Doesn't make any difference here.

The same ruling, Mr. Hughes.

Mr. Hughes: I think, also, the record on that ought to be made clear that Mr. Walker, when he testified, said that he had never seen the document, and Mr. Cleaves, although he was on the witness stand, was never questioned with respect to the document.

The Court: Well, I will take it.

It seems to me though, I may say, Mr. McManus, that you are beginning to get a tremendous amount of cumulative testimony here. I mean, we deal with coffee in here, these are two documents on coffee. The second doesn't seem to add very much. Is there any reason why we should have the record cluttered with this cumulative matter?

Mr. McManus: Your Honor, I think the fact that it is [fol. 3549] cumulative—now, I have tried to cut down pages so that we don't have any more—is a factor, I mean,

is important, because it shows—our argument is—because it shows very much the concern of the can companies in this field where they are trying to make inroads. If there were just one isolated document, it would make a lot of difference than if there were quite a number.

The Court: Well, mere quantity for its own sake is not going to do you any good.

Mr. McManus: I understand that, your Honor, but quantity combined with a certain amount of quality, I think, should be helpful.

Mr. Hughes: Your Honor, I call your attention to the fact that this exhibit is undated.

The Court: All right.

(Government's Exhibit 407 received in evidence.)

Mr. McManus: The next exhibit, your Honor, that we offer is Government's Exhibit—excuse me. Did you rule on that document?

The Court: Yes, same ruling.

Mr. McManus:—Government's Exhibit G-411, which consists of five pages, and we offer the entire document, your [fol. 3550] Honor.

Mr. Hughes: Same objection, your Honor, and may I call your Honor's attention to the fact that Mr. Lankelma, who is indicated to be the author of this document, was subpoenaed as a witness and never called by the government, so that there has really been no identification of the document beyond what the stipulation says.

The Court: Overruled.

I may say that of course if we should get past the events of the next two days, and you should continue with the defendant's case, you of course are at liberty to call any of these people.

Mr. Hughes: Yes, sir; I realize that. My point and my legal position is that the burden really is upon the government to lay a proper foundation for these documents.

The Court: Yes, I understand.
Same ruling.

(Government's Exhibit 411 received in evidence.)

The Court: Next, Mr. McManus?

Mr. McManus: Your Honor, the next exhibit is Govern-

ment's Exhibit 412, and the government offers only the [fol. 3551] first five pages. The first five pages, would include the cover.

Mr. Hughes: Well, your Honor, this is the first of a number of surveys which are to be offered in evidence, and you will recall, your Honor, that when the GCMi documents, surveys, were offered, that your Honor ruled that it was merely sufficient to show the fact of a survey—

The Court: That's right.

Mr. Hughes: —and for that reason the contents of the documents were reduced.

The Court: Well, as I understand it here, Mr. Hughes, so that we understand one another, there is a summary. Is that included within—I don't have the pages of this exhibit numbered.

Mr. Hughes: I object to the summary, because that does constitute this foreword—

The Court: I will sustain the objection to the summary.

Mr. Hughes: And the foreword, which really constitutes part of the text of the survey, its setup.

Mr. McManus: Your Honor, my position on that is this: You have to go through to the summary and including the [fol. 3552] summary, in my opinion, to tell what this survey is.

Now, I understand that when this summary indicates "Preference rating show 46 per cent in favor of glass," something of that nature, you are not taking that in as a truthful statement.

The Court: All right, Mr. McManus, it seems to me quite sufficient to take in the table of contents, the title page—the title page, the table of contents and the foreword. You don't have to go beyond that.

Mr. McManus: All right, your Honor.

Mr. Hughes: And the foreword is taken merely as descriptive of the—

The Court: Not as truth of the facts stated, but as descriptive, for the purpose of showing that Continental had a survey made on this subject matter.

Mr. Hughes: With that limitation, your Honor, may I interpose the same objection as I have made to other documents, except of course here the document didn't really

emanate from our files, in the sense that it was authored by anybody in Continental.

The Court: All right, same ruling.

[fol. 3553] (Government's Exhibit 412 received in evidence.)

Mr. McManus: With respect to 413, your Honor, the government offers the cover, page, page 1, 2, 3 and 4, for the same purpose.

The Court: I don't see any reason why you have to go beyond the cover page and page 1 on this.

Mr. Hughes: Well, your Honor, you are limiting it then to those two pages?

The Court: Yes.

Mr. Hughes: And with that limitation, the same objection is interposed as to the previous survey.

The Court: Same ruling.

(Government's Exhibit 413 received in evidence.)

Mr. McManus: Your Honor, the government offers Government's Exhibit 414, the cover page, which would be proposal for the introduction of a new soluble coffee can for the Continental Can Company.

Mr. Hughes: Well, your Honor, here, in addition to all the other objections, this doesn't even appear to be a survey. It appears on its face to be some sort of a suggestion that an advertising agency made to us. There is no indication that we ever acted on the proposal, and here it seems to me—

The Court: No, I don't see any—I will exclude it.

Mr. McManus: Your Honor—well.

The Court: You have got enough on coffee in here.

Mr. McManus: If I may, your Honor, I am afraid that I possibly might have lost a tab off one of my documents. If I could just have one minute to check with Mr. Hughes?

The Court: Yes.

Mr. McManus: Your Honor, the government would like to offer Government's Exhibit 415, which deals with baby food.

The Court: The whole exhibit?

Mr. McManus: Just a minute, your Honor. I just want to make sure that we have what we are talking about.

The Court: Now, look, you have here, as I see it, 415. You are going to offer 415-B and 416?

Mr. McManus: No, sir; your Honor.

The Court: Oh, you are not?

[fol. 3555] Mr. McManus: We are offering 415, and the first five pages.

Mr. Hughes: You are offering only the first five pages, you say?

Mr. McManus: That is correct. The charts and the data we are not offering.

Mr. Hughes: Your Honor, I interpose the same objection and call your Honor's attention to the additional fact that this is very remote in time. It goes back to the spring of 1946. I respectfully submit that is sufficient for the purposes for which it is being offered just for the title sheet to be admitted.

The Court: No, I will take it, Mr. Hughes. Overruled. Same ruling.

Mr. Hughes: Yes.

(Government's Exhibit 415 received in evidence.)

The Court: What is next?

Mr. McManus: The next, your Honor, is 416, and that would be the cover page and through the next six pages.

Mr. Hughes: What was the last one? 416, was that the one?

[fol. 3556] Mr. McManus: 416, and it would be the cover page report of Consumer's Survey on baby food in Philadelphia, and it would include the following six pages.

The Court: The last page, including "Respectfully submitted Batten, Barton, Durstine & Osborn"?

Mr. McManus: That is correct, your Honor.

Mr. Hughes: Your Honor, the same objection, and I call your Honor's attention also to the fact that this is dated in 1946, and in addition, the title page, it seems to me, is a sufficient description of the document without the necessity of including the balance of it, which contains a lot of hearsay and a lot of discussion as to how this survey was purportedly conducted.

The Court: I will take the document as offered and overrule the objection.

(Government's Exhibit 416 received in evidence.)

Mr. McManus: The next one is 417-A. The government offers the cover page—

The Court: 417-A. That is distinguished from 417; right?

[fol. 3557.] Mr. McManus: That is correct, your Honor. And we are only actually, your Honor, offering the foreword on page 2, which is the cover page.

Mr. Hughes: Here again, your Honor, this is a document that has no identification on it at all beyond the fact that it was produced. There is no stipulation with respect to it.

The Court: There is no stipulation about 417-A in the stipulation?

Mr. Hughes: There is no stipulation on this, and we have no information as to the origin of this document or anything about it.

The Court: All right.

Mr. McManus: Just a second now.

Mr. Hughes: And may I also add that the witness Larson was questioned about it and said he didn't know anything about it, and that was the substance of what he said.

The Court: In the absence of any foundation for this, I will exclude the document.

Mr. McManus: All right, your Honor.

The Court: Now, where do we go from there?

Mr. McManus: 419, your Honor.

The Court: All right, what do you want in 419?

[fol. 3558] The Clerk: My records indicate 419 is in evidence.

The Court: 419 is in evidence, according not only to our records, but according to the marking on the exhibit.

Mr. McManus: All right, sir.

Mr. Hughes: Your Honor, my understanding is that just the last two pages of 419 are in evidence.

The Court: Well, the record may show that, but I am just trying to indicate that 419 has been disposed of.

Mr. Hughes: Yes, that's right.

Mr. McManus: The next one, your Honor, would be 420, and we would offer the cover page and the foreword.

Mr. Hughes: Again, your Honor, we think it would be

sufficient for the government's purposes to show just the cover page.

The Court: It seems so to me, Mr. McManus. I don't see that you need any more than that.

Mr. McManus: Your Honor, the foreword indicates the purpose.

The Court: So does the title page, "Use, attitudes and opinions of cans against glass jars among young mothers [fol. 3559] and doctors."

Mr. McManus: Your Honor, I would still offer the cover page and one page.

The Court: All right, you get the cover page and no more.

Mr. Hughes: Same objection to this.

The Court: Yes, overruled.

(Government's Exhibit 420 received in evidence.)

Mr. McManus: The next one is 422, your Honor. We would offer the entire document here as explanatory of Continental's advertising of Aerosol containers.

Mr. Hughes: Is this Exhibit 421 you are talking about?

Mr. McManus: 422.

Mr. Hughes: Exhibit 422?

Mr. McManus: Yes. Excuse me. Did I skip one?

Your Honor, I thought I had told Mr. Hughes that we were not offering 421.

The Clerk: It is already in, Mr. McManus, according to my records.

Mr. Kuhn: No, 421-A is in. 421 is not in.

[fol. 3560] The Court: I understand they are not offering 421.

Mr. McManus: We are not offering 421. We are offering 422, your Honor.

The Court: All right.

Mr. Hughes: Same objection, your Honor.

The Court: Same ruling.

(Government's Exhibit 422 received in evidence.)

Mr. McManus: We now go, your Honor, to Government's Exhibit—

Mr. Hughes: Your Honor, may I also call attention to the fact that 422 is not dated.

Mr. McManus: We now, your Honor, go to Government's Exhibit 438, which I believe is in the next book.

Mr. Hughes: 438?

Mr. McManus: Yes.

Mr. Hughes: How much of this document are you offering?

Mr. McManus: Just page 1, your Honor.

The Court: Page 1?

Mr. McManus: Yes.

Mr. Hughes: Same objection, your Honor.

[fol. 3561] The Court: Same ruling.

(Government's Exhibit 438 received in evidence.)

Mr. Hughes: May I have a moment, please?

Mr. McManus: 439-A, your Honor.

The Court: I don't have 439-A, I don't think. What is it entitled?

Mr. Hughes: Your Honor, there is no stipulation with respect to this document, and there has been no foundation laid for it.

The Court: I don't even have it here, as far as I know. What is it called?

Wait a minute, wait a minute now.

Mr. Hughes: I wanted to correct that, your Honor. We have stipulated that it was produced from our files, but beyond that we have not stipulated. There is no foundation for it, and Mr. Walker, when he testified, was shown it and said he didn't recognize it.

So, in addition to all the other grounds that I have urged here, it seems to me that there is absolutely no foundation whatever laid for the reception of this document, no identification.

The Court: What foundation do you claim is laid for [fol. 3562] this?

Mr. Hughes: It isn't even dated, your Honor.

Mr. McManus: Your Honor, we will withdraw 439.

The Court: Very good.

Mr. McManus: The next one, your Honor, that we offer is Government's Exhibit 442. We offer the cover page and the table of contents on the next page, your Honor.

Mr. Hughes: Well, your Honor, this is another survey which was prepared by an outside firm. I object to it on all the previous grounds urged with respect to the previous surveys, and call attention to the fact that since the only purpose is to establish that a survey was made, that the title page is sufficient for that purpose.

The Court: Now, in this case, I will take through page II, consisting of four pages all told, and overrule the objection.

(Government's Exhibit 442 received in evidence.)

Mr. McManus: The next, your Honor, is Government's Exhibit 600.

[fol. 3563] Mr. Hughes: Same general objection, your Honor. There is no real foundation for this document. The most that it was stipulated was that it was from our files, and in some way prepared by the defendant.

The Court: This is a thing called "the ABCs of canning"?

Mr. McManus: That's right, sir.

The Court: Objection overruled.

(Government's Exhibit 600 received in evidence.)

Mr. McManus: The next one, your Honor, is Government's Exhibit 612.

Mr. Hughes: That was not on the list of documents. Mr. McManus indicated that that was a document that he was withdrawing.

Mr. McManus: I thought I indicated I withdrew a number of documents after 612, your Honor. I didn't intend that 612—

Mr. Hughes: May we pass that one then, your Honor?

The Court: Let's pass it and reserve it for later.

Mr. McManus: All right.

[fol. 3564] The next document, your Honor, is 641.

Mr. Hughes: Your Honor, may I inquire how much of this is being offered?

Mr. McManus: Well, your Honor, we have marked out on—I thought we had marked on defendant's copies as well as your own the parts that we were offering.

The Court: 641 consists of one page, doesn't it?

Mr. Hughes: You have, but in offering the document you didn't indicate that.

Mr. McManus: Oh, I'm sorry. We are offering the one page in Government's Exhibit 641.

Mr. Hughes: That is the page that is numbered page 2?

Mr. McManus: It is entitled "Canned foods meet highest quality standards."

Mr. Hughes: Same objection.

The Court: Overruled.

(Government's Exhibit 641 received in evidence.)

Mr. McManus: We offer Government's Exhibit 642, pages 1, 2, 3 and 4, inclusive.

Mr. Hughes: That was 642?

Mr. McManus: Yes.

[fol. 3565] Mr. Hughes: Mr. McManus, was that 642?

Mr. McManus: That is correct. All the way over to the pretty girl on the last page.

Mr. Hughes: Including that?

Mr. McManus: Including that.

Mr. Hughes: Same objection.

The Court: Same ruling.

(Government's Exhibit 642 received in evidence.)

Mr. McManus: The government offers Government's Exhibit 643, which is one page entitled "NCA president cites gains in can food popularity."

The Court: What about the pretty girl in the second and third? Are you going to leave her out?

Mr. McManus: We are going to offer her independently, your Honor. We have numbered her separately.

Mr. Hughes: Which number is that?

Mr. McManus: 643.

Mr. Hughes: Just that first page?

Mr. McManus: 643 is the first page of Canned Foods Merchandiser for January, 1958.

Mr. Hughes: That's right.

Mr. McManus: January, 1958.

[fol. 3566] 644, your Honor.

Mr. Hughes: Same objection, your Honor.

The Court: All right, 643 and 644, the objection is overruled.

(Government's Exhibits 643 and 644 received in evidence.)

Mr. McManus: 645, we offer Government's Exhibit—I withdraw that, your Honor.

The next exhibit is Government's Exhibit 648.

Mr. Hughes: 648 is your next?

Mr. McManus: Yes.

The Court: Now, 648, in my copy, has some markings on it.

Mr. McManus: Yes, we offer the entire exhibit, except where it has been X'd out, which would be the first paragraph on the first page of 648, and it would be stating with "brokers can help" on the second page of Government's Exhibit 648.

Mr. Hughes: Same objection.

The Court: Overruled.

(Government's Exhibit 648 received in evidence.)

[fol. 3567] Mr. McManus: Next is Government's Exhibit 649. We offer Government's Exhibit 649, the entire exhibit, in evidence, which includes one, two, three pages.

Mr. Hughes: Same objection.

The Court: Same ruling.

(Government's Exhibit 649 for identification received in evidence.)

Mr. McManus: The Government offers Government's Exhibit 650—

The Court: Wait a minute, now. 650, yes, except for the part which is X'd out.

Mr. McManus: Yes, starting with "Passed the test."

Mr. Hughes: Your Honor, if I am not mistaken, this exhibit is the last page really of the preceding exhibit.

The Court: I don't quite understand why this has a separate exhibit number.

Mr. McManus: Your Honor, I believe at the time we marked these we did not know if that was going to be a separate exhibit or not.

The Court: All right. Combine that page with the preceding exhibit number except for the part that is X'd out [fol. 3568] and it will be admitted as part of 649.

Mr. Hughes: Same objection.

The Court: Same ruling.

(Marked as part of Government's Exhibit 649 in evidence.)

Mr. McManus: 656, your Honor, is the next one. The Government offers page 3 and page 4.

The Court: Wait a minute. 656 is only, as I see it, two pages.

Mr. McManus: Yes, sir, which are pages 3 and 4 of the Canned Foods Newsletter for Brokers, May, 1958.

Mr. Hughes: Your Honor, I object upon the same grounds, and may I call your Honor's attention to the fact that page 3 in part, at least, appears to be nothing but a quotation from part of a letter of one Val S. Bauman, vice president of National Tea Company. I cannot see any possible relevance or materiality.

The Court: Well, Mr. Hughes, it may be relevant that Continental Can chose to distribute this puffing statement from Mr. Bauman to whomever it distributed its publication. I don't know. I will admit it.

[fol. 3569]. (Government's Exhibit 656 for identification received in evidence.)

Mr. McManus: The next number, your Honor, is 684.

Mr. Hughes: Are you offering this entire document?

Mr. McManus: Just a minute, now, Mr. Hughes.

Your Honor, we are limiting our offer the first and second pages of 684.

Mr. Hughes: Mr. McManus, may I ask you whether you would be prepared to stipulate that the type of can that is referred to in this document is now out of use? Because I think with that stipulation I would not object to it.

Mr. McManus: I have no reason to believe that it is. I don't know that it is not.

Mr. Hughes: I object to it on all the grounds—

The Court: Overruled.

(Government's Exhibit 684 for identification received in evidence.)

Mr. McManus: The next number, your Honor, is 685, [fol. 3570] and it consists of one page.

Mr. Hughes: Your Honor, this relates to the same subject matter, that can that was a ~~subject matter of the immediately preceding exhibit~~, and I object to it on all the grounds previously urged.

The Court: Overruled. Same ruling.

(Government's Exhibit 685 for identification received in evidence.)

Mr. McManus: Your Honor, the Government offers 686 for identification in evidence, the first page only.

Mr. Hughes: Again this relates to the same subject matter, and I make the same objection.

The Court: Same ruling.

(Government's Exhibit 686 for identification received in evidence.)

Mr. McManus: The next exhibit, your Honor, is Government's Exhibit 700.

Mr. Hughes: What is that?

Mr. McManus: It is the Hazel-Atlas advertisement which consists of one page.

Mr. Hughes: Your Honor, I object to this document on all of the grounds that have been previously urged and in addition may I call your Honor's attention to the fact that [fol. 3571] there is absolutely no proof that this document was ever used by Hazel-Atlas, and we have no information that it was, and for all we know it may have been the suggestion of an advertising agency. In any event, there has been no foundation whatever laid for the reception of this document.

The Court: What foundation do you say has been laid for the reception of this document, Mr. McManus?

Mr. McManus: Your Honor, this purports to be a—well, this is admitted to be a document that was produced by the defendant, Continental Can, from its files, which shows containers or we believe that it shows containers for the drug and cosmetics industry, and has stamped on the top of it, next to the spot announcements, "The Drug and Cosmetics Industry."

The Court: Where does it say that? Is this 700?

Mr. McManus: Yes, your Honor. You see, it says "Spot

Announcements" and the copy has "The Drug and Cosmetics Industry."

Now, we think, your Honor, that it does indicate Hazel-Atlas' concern and preparation of advertising material for the purpose of selling their containers for that industry. [fol. 3572] The Court: Well, is there any doubt at all that Hazel-Atlas advertises its product extensively?

Mr. Hughes: Well, when you say "extensively," your Honor, I would have some hesitation about saying—

The Court: Well, withdraw the word "extensively." Is there any doubt that Hazel-Atlas advertises its products?

Mr. Hughes: It has, yes, but we don't know whether this was ever run—

The Court: I don't know of any foundation for this. I will exclude it.

Mr. Manus: All right, your Honor.

The next exhibit, your Honor, is Government's Exhibit 715, and your Honor, we offer the three pages of 715.

Mr. Hughes: The same objection, and in addition may I specifically point out there has been no foundation laid for the introduction of this document, no showing as to whether this was ever in fact distributed for release, and we have no information on that subject. We object because there is no foundation laid for it.

The Court: I will overrule the objection.

[fol. 3573] (Government's Exhibit 715 for identification received in evidence.)

Mr. McManus: The next exhibit we have, your Honor, to offer, is Government's Exhibit 738.

Mr. Hughes: There has been no foundation laid for this document, no stipulation with reference to it, so therefore, we object to it.

The Court: No foundation. It is not referred to in the stipulation.

Mr. McManus: No, your Honor, it is not, but this is an advertisement which bears the trademark of the Continental Can Company.

The Court: I don't even know what publication it was published in.

Mr. Hughes: There is no proof that it ever in fact was published.

The Court: No. Objection sustained.

Mr. McManus: Government's Exhibit 741, your Honor.

Mr. Hughes: Your Honor, I object to this on all the previous grounds, and in addition, Mr. McManus has indicated that crowns were out of the case.

Mr. McManus: I never said that, your Honor. I never [fol. 3574] said that crowns were out of the case.

Mr. Hughes: Well, you have said that they are not in competition with screw-type closures.

Mr. McManus: I have said that.

Mr. Hughes: Excepting for that correction, I add that as an additional objection to its reception.

The Court: Where was this published? Where is it dated? What is this?

Mr. Hughes: It has no date on it, your Honor, and we have no information as to whether it was ever used or when it was used, or how it was used.

We object to it on the ground that no foundation has been laid.

The Court: All it says here is that this was produced by the defendant from its files.

Mr. Hughes: That's right.

The Court: You don't know what use was made of it, when, if ever, it was published, whether it was a draft.

No, I will exclude it.

Mr. McManus: The next one is Government's Exhibit 745, your Honor.

Mr. Hughes: I object to it on all of the grounds urged to the previous document, your Honor, but I do suggest [fol. 3575] that if Mr. McManus is prepared to stipulate that Continental Can maintained a booth at the American Bottlers of Carbonated Beverages Conventions for many years prior to the date of this document, I would be prepared to withdraw my objection.

Mr. McManus: Your Honor, I cannot see where that has much bearing on this document. I don't know. I have no way of knowing if they did or did not.

Mr. Hughes: I understood, your Honor—

The Court: Well, there is a certain amount of give and take here, Mr. McManus.

Mr. McManus: I know. I understand that, but this document was stipulated to. It was stipulated that it was produced by the defendant from its files. It was prepared on or about November, 1956, by or for the defendant, and distribute to district sales managers and plant managers.

Mr. Hughes: The point about it is, your Honor, that this document indicates at the top "First Edition."

From that, during the course of the pretrial, the Government appeared to have drawn the inference that this was something new to Continental whereas in fact they have [fol. 3576] been maintaining a booth at this Convention for many years prior to the date of this document, and, as I say, if they were prepared to stipulate to that fact I wouldn't object to it at all.

Mr. McManus: Your Honor, I am not trying to be difficult. I don't know where the first sentence has anything to do with maintaining a booth anywhere.

The Court: Well, it says "See you at the ABCB Show."

Mr. McManus: 745.

The Court: "Visit us at Bond Booth No. 00001." That is the last page.

Mr. Hughes: And then in '56, at the pretrial conference in November of '56, Mr. Greenberg stressed that this was the first edition, and he stressed the postscript and quoted to your Honor, "See you at the ABCB Show."

I withdraw that. It was at the pretrial conference—I don't have the date but it occurred in the stenographer's minutes at pages 466 to 468.

Mr. McManus: Your Honor, I don't want to quibble. I would be willing to stipulate that since Continental went into the manufacture that they have had a booth or some [fol. 3577] type of display at the ABCB Show, or whatever it is there, the Bottlers Convention.

The Court: All right, then, it will go in with that stipulation.

(Government's Exhibit 745 for identification received in evidence.)

Mr. McManus: The next document is 748, your Honor.

Mr. Hughes: Your Honor, we object to this. We have no information as to when or where this document was ever used, and in addition to all other grounds urged, that there was absolutely no foundation laid for its reception. This, again, deals with the subject of crowns.

The Court: What is the purpose of this, to show that they sell crowns? Everyone knows they sell crowns, Mr. McManus.

Mr. McManus: Yes, your Honor. Actually I think that we are offering this document insomuch as an explanation of crowns as we do the fact that they sell crowns. I know that you are aware of that, but this is a descriptive document of crowns and how crowns are produced and sold.

[fol. 3578] Mr. Hughes: I press my objection. There is no foundation laid for its reception.

The Court: I will take it. Overruled.

(Government's Exhibit 748 for identification received in evidence.)

Mr. McManus: The next document, your Honor, is Government's Exhibit 750.

Mr. Hughes: This document is undated and I object to it on all the grounds previously urged.

The Court: Overruled.

(Government's Exhibit 750 for identification received in evidence.)

Mr. McManus: The next document is 751.

The Court: How much of this do you want to put in?

Mr. McManus: May I have just a second, your Honor?

The Court: Yes.

Mr. Hughes: The same objection, and there is no foundation laid for its reception. We have no information as to whether this interview was ever used by the defendant or by White Cap, and it appears, so far as we know, to be a draft of a possible interview of an employee of White Cap Company.

[fol. 3579] The Court: A possible interview? This is the report on White Cap Engineering & Services. This is 750, isn't it?

Mr. McManus: I thought you admitted 750, your Honor. Maybe we have gotten out of step here.

The Court: Did you offer 749?

Mr. McManus: No, sir, your Honor, I did not.

The Court: Then I omitted 750. All right, it is 751.

Mr. Hughes: I don't know whether your Honor heard my additional objection to this. We just have no information with respect to whether or when or how this document was used, and it would appear merely to be a draft of a proposed interview of an employee of White Cap Corporation on some possible—

The Court: Yes. I don't see that there is any foundation for this. All that may happen is that this may be just promotional blurbs from Harshie-Rotman, whoever they are.

Mr. McManus: The defendants have admitted, your Honor, that it was produced from their files. It was prepared by Harshie-Rotman for White Cap Company, a subsidiary of the defendant, and in our request to admit they [fol. 3580] answered that it was made in the course of their respective engagement.

Mr. Hughes: That is quite true that we acknowledged that it was prepared by them for us, but beyond that we haven't gone, and I repeat that we have no information whatever as to whether this was ever used.

If the plaintiff had really thought this document had great significance, it could easily have gone into it during the taking of the depositions, or during the pretrial period to establish its admissibility.

The Court: I don't see that any proper foundation has been laid for its admission, Mr. McManus. I will exclude it.

Mr. McManus: Now, the next exhibit, your Honor, is Government's Exhibit 752.

Mr. Hughes: Same objection, and I repeat here with respect to this document that we again have no information as to whether this press release was ever used or ever issued. There is no foundation whatever laid for its reception.

Here again this is something the Government could have pursued if it so desired.

[fol. 3581] The Court: Yes. I will exclude it.

Mr. McManus: 754, your Honor, in which the defendants state this this document—

The Court: Yes. I see it.

Mr. Hughes: Same objection.

The Court: The same ruling as previously. We will admit it.

Objection overruled.

Mr. Hughes: Yes, your Honor.

(Government's Exhibit 754 for identification received in evidence.)

Mr. McManus: 755 is the next one, your Honor.

The Court: This is in the same category.

Mr. McManus: All right, your Honor, we will withdraw Government's Exhibit 755.

Mr. Hughes: Same objection to this as was made to—

The Court: 755 has been withdrawn.

Mr. Hughes: Oh, yes.

The Court: Next?

Mr. McManus: Well, your Honor, 756: The Government offers Government's Exhibit 756.

Mr. Hughes: Same objection to that as to the other [fol. 3582] Harshe-Rotman publicity releases.

The Court: No evidence as to what the nature of this document is or what was done with it. I will sustain the objection.

Now Mr. McManus, how much have you got to go here?

Mr. McManus: We are at 756. We have between six and eight at the most, your Honor.

The Court: I think we will take a luncheon recess now. There will be a couple of loose ends to finish up after lunch anyway, so we will return here at 2:15, gentlemen.

(Recess to 2:15 p.m.)

[fol. 3583]

AFTERNOON SESSION

2:25 P.M.

The Court: All right.

Mr. McManus: Your Honor, I believe this will take us only a few minutes.

If you will go now to Government's Exhibit 759 for identification.

Mr. Hughes: 759?

Mr. McManus: 759.

The Court: Now, you are presenting this apparently for the advertisement by the White Cap Company; is that right?

Mr. McManus: Yes, your Honor.

The Court: Any objection to this?

Mr. Hughes: Same objection, your Honor.

The Court: Overruled.

(Government's Exhibit 759 received in evidence.)

Mr. McManus: 772, your Honor, would be the next one.

Mr. Hughes: Your Honor, the same objection as to all the other documents, and I call your Honor's attention to the fact that the document is undated and there is no foundation of any kind that I am aware of that has been laid [fol: 3584] for this document.

The Court: As I understand it, this document, according to the stipulation, was prepared for use as advertising material by or for White Cap Company.

Mr. Hughes: Yes, sir.

The Court: A subsidiary of the defendant.

Mr. Hughes: Yes, sir. I withdraw my objection. No objection.

The Court: All right, it may be received.

(Government's Exhibit 772 received in evidence.)

Mr. McManus: Your Honor, the other document that we had, there was some question about Government's Exhibit 612, whether I had indicated 612 or not, and you said that you would come back to that.

Mr. Hughes: Well, your Honor, I interpose the same general objection to that, and I will point out that it was apparently Mr. Smart who prepared that document, and he was a witness, and he was not examined at all concerning the document, and no attempt was made to lay a foundation for the admission of this document.

The Court: It is not in the stipulation, is it?

[fol: 3585] Mr. McManus: Yes, it is, your Honor.

The Court: It is?

Mr. McManus: Yes.

Mr. Hughes: I want to be clear about that, your Honor. Your Honor, you have my copy of the stipulation, and my working notes don't indicate—

The Court: The stipulation says, "This document was produced by the defendant from its files. It was prepared on or about December 13, 1954, by S. B. Smart, then assistant product sales manager of defendant."

Mr. Hughes: And he was a witness and he wasn't asked anything about this document, your Honor, and I submit there is no foundation been laid for it.

The Court: How much of this 612 do you want?

Mr. Hughes: I think the first page would be satisfactory, your Honor.

The Court: All right, objection overruled.

(Government's Exhibit 612 received in evidence.)

Mr. McManus: Your Honor, there is one other document, which I understand is not in evidence, and which I [fol. 3586] did not put on the list, but which has been referred to, I think, by both sides, and possibly for the information of the Court and to elucidate our discussions here I would like to offer Government's Exhibit 304. It is the Articles of Incorporation and Code of Regulations of GCMI, the Glass Container Manufacturers Institute.

Mr. Hughes: Your Honor, I object to it. I don't object on the ground that it isn't a true copy, I dispute that, but I object to it as incompetent and irrelevant and immaterial.

The Court: Overruled.

(Government's Exhibit 304 received in evidence.)

Mr. McManus: Your Honor, the only other matter that I have is, I understand that on Government's Exhibit 1209 for identification, which was the notice and proxy statement—

The Court: That is the Gair proxy statement.

Mr. McManus:—the part that you indicated, the sections that you indicated would be admitted; is that correct?

The Court: 4 and 5.

Mr. Hughes: Well, I think your Honor already admitted [fols. 3587-3591] those, as I understood.

The Court: Well, if I have not, 4 and 5 of 1209 will be admitted. The balance will be excluded.

Mr. McManus: All right, your Honor.

Your Honor, the only other matter that we have is, one of the people that prepared our chart relating to past ac-

quisitions was a little bit embarrassed because it was indicated that the Reynolds Plastics Division of Reynolds Spring Company was a spring company or an aviation corporation. This doesn't really add to the case, but if the record would show that it appears that it was a plant producing molded plastics at Cambridge, Ohio.

Mr. Johnson: I think Mr. McManus has perhaps misunderstood my statement this morning. I said I believed that it was making bomber parts.

Mr. McManus: I see.

The Court: All right.

Mr. McManus: In that case, your Honor, with that on the record, the government rests.

[fols. 3592-4208] New York, October 19, 1960, 10:35 A.M.

Trial resumed

The Court: Yes, Mr. Handler.

MOTION OF DEFENDANT TO DISMISS

Mr. Handler: If the Court please, now that the plaintiff had completed the presentation of its evidence, the defendant moves for a dismissal upon the ground that on the law and the facts the plaintiff has shown no right to relief. We are seeking a final judgment on the merits, dismissing the complaint.

[fol. 4209] New York, December 8, 1960; 10:30 o'clock a.m.

Trial resumed

Present: Mr. McManus, Mr. Greenberg, Mr. Hughes, Mr. Johnson, Mr. Kuhn, Mr. Handler.

ORAL RULING ON DEFENDANT'S MOTION TO DISMISS

The Court: Gentlemen, we have been in recess, and I am going to read to you some material that I have prepared here which will bear on our situation.

On October 18, 1960, the Government closed its case and rested after some six weeks of trial. Thereupon, the defendant moved for a dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and for judgment on the merits in its favor on the ground that upon the facts and the law the Government had shown no right to relief. In substance, defendant contended that the Government had failed to establish that the merger of Continental Can [fol. 4210] Company, a manufacturer of tin cans and numerous other products, and Hazel-Atlas Glass Company, primarily a manufacturer of glass containers, violated Section 7 of the Clayton Act. I heard extensive argument by counsel for the respective parties on defendant's motion, and both sides have briefed the questions presented.

At the conclusion of the argument the trial was adjourned for a month so that I could carry out my assignment in Civil Part I of this court, where I have been continuously engaged during November. However, while on this assignment I have been able to make a study and analysis of the record in this case, the briefs submitted by counsel, and the transcripts of the very full oral arguments before me.

I am now prepared to give you my decision on the defendant's motion for dismissal. However, what I am about to say will be the bare bones of my decision only. I have had no time to prepare the opinion, which will follow in due course and which will contain a full statement of the facts and the law with reference to the motion and the reasoning [fol. 4211] leading to the results that I have reached. I will not attempt this morning to do more than give you some ultimate conclusions.

This case is being tried by the Court without a jury. Rule 41(b) of the Rules of Civil Procedure provides that where defendant moves for dismissal at the close of the plaintiff's case on the ground that upon the facts and the law the plaintiff has shown no right to relief, "the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

In making such a determination, the Court may weigh all the evidence presented by the plaintiff, draw inferences therefrom, and determine whether the plaintiff has sustained its burden of establishing the right to relief which it claims. The question is not merely whether the plaintiff, at the close of its evidence, has made out a prima facie case, where such inferences as there are must be those most favorable to the plaintiff. It is rather whether upon the record the plaintiff would be entitled to the relief which it claims were the case to end there.

[fol. 4212] The problem then is whether the plaintiff has met this test. If it has, defendant's motion for a dismissal must be denied. If it has not, the motion must be granted.

Section 7 of the Clayton Act forbids the acquisition of one corporation by another "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Act does not prohibit mergers or acquisitions as such, even though they may result in some lessening of competition. It deals only with such acquisitions as will probably result in lessening competition to a substantial degree.

The Government has the burden of proving a violation of the statute by a preponderance of the evidence, and in order to succeed it must sustain that burden on each element of its case.

There are two elements to the Government's case. First, it must establish the appropriate lines of commerce or relevant markets in the appropriate sections of the country which are affected by the acquisition under attack.

[fol. 4213] Second, it must establish that the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in such relevant market or

markets. In substance, its burden is to show that there is a reasonable probability that competition will be substantially lessened in any of the areas of effective competition, established to be relevant markets.

It is not necessary for the Government to establish the probability of substantial lessening of competition in all the markets for which it may contend, but merely that there is the probability of such lessening in any line of commerce in any section of the country.

In the case at bar, the Government contends that there are ten separate lines of commerce in which the effect of the acquisition of Hazel-Atlas by Continental may be substantially to lessen competition or to tend to create a monopoly. In each of these lines of commerce the Government claims that the section of the country affected is the United States as a whole. As to eight of the lines of commerce it contends that sections of the country also affected are the United States east of the Rocky Mountains and the United [fol. 4214] States west of the Rocky Mountains.

It may be noted that the Government originally contended that there were other sections of the country affected in various of the lines of commerce contended for, but it has withdrawn such claims.

The ten lines of commerce in which the Government contends that competition may be substantially lessened are specified with particularity in the Government's answer to defendant's interrogatories in December 1958, some two years ago. These lines of commerce remained unchanged through many exhaustive pretrial sessions in which the issues to be tried were carefully limited and defined, and during the more than six weeks of the trial itself. These are the issues tendered by the Government, and it is upon these issues that the case has been tried.

Each of these lines of commerce and the claimed effects of the acquisition within them will be dealt with briefly separately.

[fol. 4215]

As its first line of commerce, the Government specified containers for the canning industry and defined canning as "the process of sterilizing foods, including juices, by heat

and hermetically sealing them in tin cans and glass containers."

I will assume for purposes of this discussion that the Government's evidence establishes this to be a line of commerce and a relevant market, although that question is by no means free from doubt. Even if such an assumption be made, however, the Government has failed to establish any basis upon which I could find that competition within this line of commerce may be lessened to any substantial degree by this acquisition, for I find in this record no evidence as to either the size or shape of the relevant market or the share of either of the merging companies in it.

Indeed, the Government practically concedes that it has failed to make such a showing, for after the case had proceeded for over two years through the lengthy pretrials, through six weeks of trial, and through the defendant's argument on its motion for dismissal, the Government virtually abandoned its claim as to substantial lessening of [fol. 4216] competition within this line and attempted to substitute an entirely new and greatly expanded line of commerce for it.

During the course of its argument in opposition to the motion for dismissal, the Government asserted for the first time that heat sterilization was not a part of this line of commerce but that the key word in the Government's description of the canning container market was hermetic sealing. Moreover, under the Government's interpretation of hermetic sealing, all food containers made of tin or glass are hermetically sealed. Thus the Government in substance urges that this line of commerce covers all food containers made of tin or glass.

Apart from the manifest unfairness to the defendant of permitting the Government completely to switch its theory at this thirteenth hour, the proposed new line of commerce—in substance, all food in glass or cans—recommends itself neither to logic nor to the realities of the market place. The evidence produced by the Government is wholly insufficient to establish that there is any such line of commerce [fol. 4217]. Assuming that such a line of commerce existed, however, the Government's proof is insufficient to show that there may be lessening of competition within any

such line of commerce by reason of the acquisition, to any substantial degree.

II

The second line of commerce specified by the Government is delineated as containers for the beer industry, consisting of glass bottles and metal cans used to market beer. I find that there is sufficient evidence in the record which, standing uncontradicted, establishes that this line is a line of commerce, or a relevant market.

However, the evidence adduced by the Government is insufficient to establish that the effect of the acquisition may be substantially to lessen competition within this relevant market. Without going into detailed figures at this time, the percentage share of Hazel-Atlas Glass Company in the relevant market ranged from 0.14% in 1955 to 0.17% in 1957—in other words, less than 2/10ths of 1% of the relevant market. This share is so insignificant as to show on its face that Hazel-Atlas was not a significant competitive factor in this line of commerce at the time of the merger, [fol. 4218] or at any time thereafter.

Recognizing this, the Government sought to establish that though there might be no substantial lessening of actual competition, there was substantial lessening of potential competition.

I find that the Government has failed to establish that there was substantial lessening of potential competition in this relevant market by reason of the acquisition, for it has not shown a probability that Hazel-Atlas would have become a significant competitive factor had the merger not taken place.

III

The next line of commerce which the Government delineated was "containers for the soft drink industry," consisting of both tin cans and glass bottles.

There is great difficulty in finding evidence in the record to establish this line of commerce as a relevant market. Under the definitions advanced by the Government, this market includes containers for both carbonated and non-carbonated soft drinks. The evidence relied on to establish this as a line of commerce is confined almost entirely to con-

tainers for carbonated beverages. Such evidence does not [fol. 4219] establish a relevant market of both carbonated and non-carbonated beverages.

Assuming, however, that the evidence justified a finding of a separate line of commerce which was limited to glass and metal containers for carbonated beverages only, which is a departure from the line for which the Government has contended throughout this trial, there is a failure of proof on the crucial issue of whether the effect of the acquisition may be substantially to lessen competition in that relevant market. While the Government's proof in support of its claimed line of commerce deals solely with carbonated beverages, the evidence upon which it relies to establish substantial lessening of competition in that line relates to containers both for carbonated and non-carbonated soft drinks. This divergent approach to the two issues relating to this subject matter makes it impossible to reach any conclusion as to the lessening of competition in a relevant market of containers for carbonated soft drinks only.

But even if the Government's original definition of this line of commerce, i.e., containers for both carbonated and [fol. 4220] non-carbonated beverages, should be deemed to have been established, it has failed to prove that the acquisition of Hazel-Atlas tends to lessen or has lessened competition in this line to any substantial degree. The percentage share of the relevant market in soft drink containers of Hazel-Atlas ranged from .03% in 1955 to less than .5% in 1957—in other words, a maximum of $\frac{1}{2}$ of 1% of the relevant market. This insignificant share of the relevant market indicates plainly that Hazel-Atlas was not a significant competitor in this line of commerce and that there was no actual lessening of competition in any substantial degree by reason of the merger.

Again, the Government urges that there was a lessening of potential competition from Hazel-Atlas. I find, however, that the Government has failed to establish a probability that Hazel-Atlas would have become a significant competitive factor in this relevant market had the merger not taken place and has therefore not shown that there was a lessening of potential competition to any substantial degree.

[fol. 4221]

IV

The next three lines of commerce for which the Government contends may be treated together. They are as follows:

- (a) Containers for the toiletries and cosmetics industry;
- (b) Containers for the medicine and health industry;
- and
- (c) Containers for the household and chemical industry.

What the Government means by these definitions are containers for the products produced and marketed to the public by each of these industries. In each of these three lines of commerce the containers referred to include glass containers, tin cans and plastic bottles.

Even assuming that each of these separate lines of commerce has been established and that each constitutes a relevant market, the Government has failed to furnish the proof which would be necessary in order for me to find that the acquisition may lessen competition within any of such markets to any substantial degree.

In the first place, there is nothing from which I can find [fol. 4222] what the size of each of these relevant markets is. In the second place, there is insufficient evidence from which to find what the defendant's share of these relevant markets is. In the absence of such evidence, it is impossible for me to determine whether or not the effect of the acquisition may be substantially to lessen competition in these lines of commerce.

The plaintiff's suggestion that all of these lines of commerce be lumped together and viewed as a single line results only in confusion multiplied. There is insufficient in this record to establish either that there is any such separate line of commerce on the one hand, or, on the other, that competition in any such line of commerce may be substantially lessened.

V

The next line of commerce which the Government advances is the can industry. This includes all metal cans of every nature and description. The defendant concedes that

the can industry as so defined is a separate line of commerce.

However, I find that the evidence adduced by the Government is insufficient to establish that this acquisition may [fol. 4223] lessen competition in this relevant market to any substantial degree. In acquiring Hazel-Atlas the defendant did not acquire a can manufacturer but a manufacturer of glass containers. There is no proof in this record which establishes that the acquisition of this glass manufacturer by a manufacturer of cans and other products may lessen competition in the relevant can market to any substantial degree, nor does the evidence establish that potential competition in this market will be so lessened.

VI

The next line of commerce which the Government advances is denominated as the glass container industry. This includes all glass containers used for packaging. Here again, the defendant has conceded that this is a separate line of commerce.

However, the same conclusion must be reached with respect to this line of commerce as was reached with respect to the can industry line. The evidence adduced by the Government has failed to establish that there may be substantial lessening of competition in the glass container industry, potentially or otherwise, by reason of this acquisition.

[fol. 4224]

VII

The next line of commerce which the Government advances is metal closures. These are the metal caps which are fitted over containers to close them, largely for glass bottles and jars. Only those made of tinplate are included. For reasons not clear to me, aluminum and plastic closures are excluded.

The Government has now limited this line of commerce to include only vacuum type closures and screw-thread and lug-type closures. It has chosen to exclude crown caps or closures from this line of commerce.

The White Cap Division of Continental Can makes vacuum closures but not non-vacuum closures. Hazel-Atlas

makes no vacuum type closures but only non-vacuum closures. The two are not in competition with one another. A line of commerce cannot be established by lumping together two non-interchangeable products used for different purposes. The Government has failed to establish such a line of commerce or relevant market.

VIII

Finally, the Government contended that the packaging industry, which included almost every conceivable type of [fol. 4225] packaging material used in the United States was a separate line of commerce. I have already found that the Government had failed to establish any such line of commerce or to show that there might be any substantial lessening of competition within such line of commerce if it existed, by reason of this acquisition. The Government's claim as to this line was dismissed at the end of its case.

In each of the lines of commerce for which the Government contends, it has also urged that the effect of the acquisition was to tend to create a monopoly. I find that the evidence fails to establish such a tendency in any of the lines of commerce specified.

The basic defect in the Government's case does not lie in its theories but in the nature and quality of its proof. Many of the propositions of fact on which the Government relies find support only in argument. Others rest on most insubstantial and evanescent evidentiary foundations. Statements of counsel as to what the facts may be or inferences based on incomplete if not misleading statistics or mere glittering generalities cannot be substituted for evidence, cannot be substituted for proof, and they cannot [fol. 4226] furnish a basis for finding the facts necessary to sustain the Government's case.

The evidence adduced by the Government is insufficient, both qualitatively and quantitatively, to establish that this acquisition has violated Section 7 of the Clayton Act in any respect. The Government has not established by competent proof that it is entitled to relief against this defendant.

Under these circumstances, there is no need to put the defendant to its proof and to place upon it the burden of

putting in extensive evidence to rebut a case which has not been made out. I conclude, therefore, that the defendant's motion for dismissal of the action must be granted.

As I have indicated, this decision does not constitute my opinion in this case. I will hand down an opinion at a later date dealing fully with the background of the case, the evidence in the record, the controlling legal principles, and my detailed findings and conclusions.

In view of the decision, which I felt in all justice to the parties and to counsel should be announced as soon as possible, the trial is now at an end, and I will make appropriate directions in my opinion as to the entry of judgment in [fol. 4227] favor of the defendant.

[fol. 4228] REPORTER'S CERTIFICATE TO ABOVE TRANSCRIPT
OMITTED IN PRINTING

[fol. 4229] [File Endorsement Omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

Civil 112-387.

UNITED STATES OF AMERICA, Plaintiff,

against

CONTINENTAL CAN COMPANY, INC. AND HAZEL-ATLAS GLASS
COMPANY, Defendants.

Appearances:

Lee Loevinger, Esq. Assistant Attorney General W.
Wallace Kirkpatrick, Esq. Acting Assistant Attorney General
Larry L. Williams, Esq. Chief, Special Trial Section,
Department of Justice George D. Reyecraft, Jr., Esq. Chief,
Special Trial Section, Department of Justice William H.

McManus, Esq. (Trial counsel) Samuel V. Greenberg, Esq. (Trial counsel) Attorneys, Department of Justice for the United States.

Willkie, Farr, Gallagher, Walton & Fitz Gibbon, Esqs. Attorneys for Defendants Mark F. Hughes, Esq. (Trial counsel) Helmer R. Johnson, Esq. (Trial counsel) Milton Handler, Esq., (Trial counsel) Bowie K. Kuhn, Esq. Stanley D. Robinson, Esq. Of counsel.

[fol. 4230] OPINION—April 16, 1963

BRYAN, District Judge:

This is a civil action by the United States to enjoin the proposed acquisition by defendant Continental Can Company, Inc. (Continental) of defendant Hazel-Atlas Glass Company (Hazel-Atlas) on the ground that such acquisition would violate § 7 of the Clayton Act as amended.¹ The court has jurisdiction over parties and subject matter.

The Government had previously attempted to block the acquisition by invoking a consent decree which had been entered against Continental in 1950 in a civil anti-trust suit under §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act in the District Court for the Northern District of California. On August 31, 1956 the California² court held that the consent decree did not cover the proposed acquisition.² [fol. 4231] The consummation of the acquisition was delayed in the meantime at the Government's request. The Government then commenced this action. It moved for a preliminary injunction against consummation and sought a temporary restraining order pending the hearing and de-

¹ 15 U.S.C. § 18: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ."

² United States v. Continental Can Company, 143 F. Supp. 787 (N.D. Cal. 1956).

termination of its motion. The temporary restraining order was denied on September 13, 1956. On that day, Continental took over all of the assets, property, business and good will and assumed all of the liabilities of Hazel-Atlas, which since then has been operated as the Hazel-Atlas Division of Continental.

The Government withdrew its motion for a preliminary injunction on September 18, 1956 and this action became one for divestiture.

After some considerable time, the case was assigned to me for all purposes. Extensive pre-trial proceedings were conducted at which over a thousand pages of transcript were taken. The case then came on for trial.

The Government concluded its case after six weeks of trial during which it called some 78 witnesses. Over four thousand pages of testimony were taken. The Government introduced more than twelve hundred exhibits and the defendants more than five hundred.

[fol. 4232] At the conclusion of the Government's case defendants, pursuant to Rule 41(b), F.R.C.P., moved for a dismissal on the ground that upon the law and the facts the Government had shown no right to relief and that they were therefore entitled to final judgment on the merits. The motion was granted in a brief oral decision which stated only the conclusions reached. In view of the importance and complexity of the case a detailed opinion was to follow.

Before that opinion could be filed, the Supreme Court decided *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962), its first decision dealing at any length with § 7 of the Clayton Act as amended in 1950. The Government then asked leave to submit material dealing with the effect of that case on the case at bar. This application was granted and both sides submitted briefs on this question. Consideration of the *Brown Shoe* case has not changed the conclusions which I reached at the end of the trial.

My opinion follows.

Defendants' motion under Rule 41(b) for a dismissal at the close of the Government's case, posed squarely the question of whether on the record, as it then stood, defendants were entitled to judgment.

The motion was made on the ground that "upon the facts and the law the plaintiff has shown no right to relief." In an action tried to the court without a jury, the court, when such a motion is made at the close of plaintiff's case, "as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

There is no doubt as to the meaning and applicability of Rule 14(b). The test to be applied in a case tried to the court alone is quite different from that on a motion to dismiss or for a directed verdict in a jury trial. In the latter case the question is whether or not the plaintiff has made out a prima facie case sufficient to go to the jury and the court must view the evidence in the light most favorable to him.

In a trial to the court alone, however, the court is authorized under Rule 41(b), to evaluate and weigh all of the evidence presented by the plaintiff, draw such inferences therefrom as it considers reasonable in the light of the record, and determine at that stage whether plaintiff has sustained the burden of proof necessary to establish its right to relief were the case to end there. If the court undertakes to make such a determination and concludes [fol. 4234] that the plaintiff has not met this burden, the defendant is entitled to judgment on the merits.³

In this case, as the trier of the facts, I determined at the conclusion of the Government's case that it had failed to sustain its burden of showing by a preponderance of the evidence that the acquisition under attack violated Section 7 of the Clayton Act in any respect. I therefore directed that judgment be rendered against the Government.

³ Global Commerce Corporation v. Clark-Babbitt Industries, Inc., 255 P. 2d 105 (2 Cir. 1958); Huber v. American President Lines, 240 F. 2d 778 (2 Cir. 1957); Henry v. Moore-McCormack Lines, Inc., 134 F.Supp. 71 (S.D.N.Y. 1955); Brahms v. Moore-McCormack Lines, Inc., 133 F. Supp. 283 (S.D.N.Y. 1955); 5 Moore's Federal Practice p. 1044, et seq. (2d ed. 1951). See also Blood v. City of New York, 237 F. 2d 855 (2 Cir. 1956).

I

Section 7 of the Clayton Act in the light of the
Brown Shoe case

The Government's case is grounded solely on Section 7 of the Clayton Act as amended in 1950. There is no claim of violation or threatened violation of any provision of the Sherman Act. There is no charge of restraint of trade, monopolization or attempt to monopolize. This is strictly a Section 7 case.

Section 7 as amended forbids the acquisition of the stock or assets of one corporation by another "where in any line of commerce in any section of the country, the effect of [fol. 4235] such acquisition may be substantially to lessen competition, or to tend to create a monopoly."⁴ The *Brown Shoe* case, decided on June 25, 1962, some twelve years after the 1950 amendment to § 7, is the first definitive interpretation of that section by the Supreme Court since its amendment.

The facts in the *Brown Shoe* case were entirely different from those in the case at bar. The specific holdings of the Court on the facts presented there are therefore not determinative of the problems posed here. Indeed, *Brown Shoe* recognizes that the facts in each case in all likelihood will differ widely, that the framework of each industry is likely to be unique, and that each case must stand or fall on its own facts viewed within the framework of the industry pattern.⁵

However, the discussion in *Brown Shoe* of the legislative history and background of the 1950 amendment to § 7, the theory of the amended section, the interpretation to be given to it, and the principles and guidelines to be followed in applying it, is controlling.⁶ *Brown Shoe* is the authoritative declaration of the law on the subject as it now stands

⁴ 15 U.S.C. § 18.

⁵ *Brown Shoe Co. v. United States*, *supra*, pp. 321-322.

⁶ The legislative history of Section 7 and the 1950 amendment is reviewed exhaustively in *Brown Shoe* (370 U.S. pp. 311-323). Further general discussion here is unnecessary.

[fol. 4236] and the principles and guidelines which it lays down must be applied here.

Section 7 proscribes acquisition of either stock or assets where, as a result, competition in any line of commerce in any section of the country may be substantially lessened. It covers all mergers or acquisitions, horizontal, vertical or conglomerate.⁷

As *Brown Shoe* makes plain, however, the section does not prohibit all mergers. While the congressional intent was to arrest restraints of trade and monopolistic tendencies "in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding,"⁸ there is no per se proscription against the acquisition of the stock or assets of one corporation by another. The statute is concerned only with those acquisitions which have demonstrable anti-competitive effects.⁹

It is clear, moreover, that the statute was directed neither at the possibility that anti-competitive effects might occur nor at certainty of anti-competitive effects already covered [fol. 4237] by the Sherman Act.¹⁰ "[P]roof of a mere possibility of a prohibited restraint or tendency to monopoly will not establish the statutory requirement . . ."¹¹ The statute is concerned with the reasonable probability of the lessening of competition or tendency toward monopoly as a result of the particular acquisition under scrutiny—a showing that such effects are reasonably likely to occur. This is what the words "may be" as used in the statute mean.¹² The lessening of competition, moreover, must also be shown to be "substantial".¹³

Acquisitions are proscribed where substantial anti-competitive effects or tendency to monopoly are reasonably

⁷ *Brown Shoe Co. v. United States*, *supra*, p. 317.

⁸ S. Rep. No. 1775, 81st Cong., 2d Sess. pp. 4-5 (1950).

⁹ *Brown Shoe Co. v. United States*, *supra*, pp. 319-320.

¹⁰ *Brown Shoe Co. v. United States*, *supra*, p. 323.

¹¹ *United States v. E. I. duPont de Nemours & Co. (General Motors)*, 353 U.S. 586, 598 (1957).

¹² *A. G. Spalding & Bros., Inc. v. Federal Trade Commission*, 301 F. 2d 585 (3 Cir. 1962)

¹³ S. Rep. No. 1775, 81st Cong. 2d Sess., p. 3 (1950).

probably in *any* line of commerce in *any* section of the country. Thus, in order to determine whether there are anti-competitive effects or tendency to monopoly, it is necessary in each case to define the lines of commerce in which the acquiring and acquired companies were engaged and the sections of the country affected. Anti-competitive effects and their substantiality cannot be evaluated in a [fol. 4238] vacuum. They can only be judged in terms of the particular markets or sub-markets affected—that is to say “within the area of effective competition.”¹⁴

While Section 7 does not use the term “market”, it is clear that “line of commerce” refers to a product market, and “section of the country” refers to a geographic market in which competition exists and in which the effects of the acquisition may be felt. A relevant product market must be a market which is meaningful in terms of competitive and commercial realities.¹⁵ A relevant geographic market must embrace an economically significant section of the country in terms of competitive effects.¹⁶

Thus, relevant markets are neither economic abstractions nor artificial conceptions. They are rather specific areas where, viewed in the context of the facts of the particular case under consideration, there may be demonstrable anti-competitive effects as the result of the acquisition. The test [fol. 4239] then is whether the acquisition has demonstrable anti-competitive effects in any relevant product market in any section of the country.

Section 7 does not spell out any particular tests or standards for determining the relevant product markets or geographic areas which may be affected by the acquisition. Nor does it supply, either in quantitative or qualitative terms, any tests for determining whether the effects may be “substantially” to lessen competition. “However, sufficient expressions of a consistent point of view may be found in the hearings, committee reports of both the House

¹⁴ United States v. E. I. duPont de Nemours & Co. (General Motors), *supra*, 593.

¹⁵ Crown Zellerbach Corporation v. Federal Trade Commission, 296 F. 2d 800, 811, (9 Cir. 1961), *cert. den.* 370 U.S. 937 (1962).

¹⁶ Brown Shoe Co. v. United States, *supra*, p. 320.

and Senate and in floor debate to provide those charged with enforcing the Act with a usable frame of reference within which to evaluate any given merger."¹⁷

Against this background the tests and standards to be used vary depending upon what may be appropriate in the light of a wide variety of factors. These factors include the nature, business and relationships of the acquired and acquiring companies, the markets which they serve, the kind and extent of competition in such markets, the pattern of the industry as a whole and the place of such companies in the industry.

Thus, in determining relevant product markets it has [fol. 4240] been deemed pertinent to examine such factors as the peculiar uses and characteristics of the product; its distinguishing physical characteristics; whether it is sold to distinct classes of customers; distinct price differentiation; sensitivity to price changes; reasonable interchangeability of use and demand; public or industry recognition of the market as a separate market entity; unique production facilities; and specialized vendors.¹⁸

In determining the geographic market pertinent factors include scale of distribution; locale of actual and potential buyers and of competing sellers; focus of competition; and whether regional markets interlock to form a larger market.¹⁹

None of these factors are conclusive in themselves and all must be "functionally viewed, in the context of [the] particular industry."²⁰ Mere mechanical or quantitative application of § 7 should be avoided and each case must be judged in the light of its own peculiar facts. Only within

¹⁷ *Brown Shoe Co. v. United States*, *supra*, p. 315.

¹⁸ *Brown Shoe Co. v. United States*, *supra*; *United States v. E. I. duPont de Nemours & Co. (General Motors)*, *supra*; *Crown Zellerbach Corporation v. Federal Trade Commission*, *supra*; *United States v. Bethlehem Steel Corporation*, 168 F. Supp. 576 (S.D.N.Y. 1958).

¹⁹ *Brown Shoe Co. v. United States*, *supra*; *A. G. Spalding & Bros., Inc. v. Federal Trade Commission*, *supra*; *United States v. Bethlehem Steel Corp.*, *supra*.

²⁰ *Brown Shoe Co. v. United States*, *supra*, pp. 321-322.

such a setting can the probable anti-competitive effects of a merger be judged.²¹

[fol. 4241] In the light of these considerations the issues on which the Government had the burden of proof here were twofold. First, it was required to delineate the relevant product markets or submarkets in which it claimed that competition was adversely affected by the acquisition and the sections of the country affected. Second, it had to establish that in one or more of such markets or submarkets in any particular section or sections of the country, there was reasonable probability that the effect of the acquisition would be substantially to lessen competition or to tend to create a monopoly.

II

The merging companies

(1) Continental

Continental Can Company, Inc. is a New York corporation with its principal offices in New York City. It was organized in 1913 by the merger of three companies engaged in the manufacture of metal cans.²² At that time American Can Company was the dominant factor in the can industry.

After its organization Continental went through a period [fol. 4242] of substantial internal expansion. Beginning in 1923 and for the next twenty years it continued to expand internally and also by acquiring some twenty-four companies in various sections of the country which were also engaged in manufacturing various types of cans, some of which had not been previously manufactured by Continental. It also acquired several companies which did not

²¹ Brown Shoe Co. v. United States, *supra*, p. 340.

²² The three original companies were Continental Can Company, a New Jersey corporation; the Export and Domestic Can Company, a New York corporation; and the Standard Tin Plate Company, a Pennsylvania corporation.

produce metal cans but made other packaging products. Continental acquired its last can manufacturer in 1944.

Since that time it has engaged in a program of diversification aimed at increasing the variety of products which it is able to supply.

Its acquisitions have included companies producing can manufacturing and can closing machinery, flexible packaging, plastic containers and other plastic products, paper containers and paperboard, fibre drums, crown caps and vacuum closures, and a miscellany of other products.

In 1956 it acquired Hazel-Atlas, Robert Gair Company, Inc., a manufacturer of paperboard and similar products, and White Cap Company, which manufactured vacuum type metal closures.

By that time it was and had been for a good many years the second largest metal can manufacturer in the country. It was a formidable competitor of American Can Company [fol. 4243] which had long been the leader in the industry.

When it acquired Hazel-Atlas Continental's principal business was the manufacture and sale of metal cans and other metal containers to industrial consumers for a wide variety of uses. In 1955 metal cans and other metal containers accounted for between two-thirds and three-quarters of its total dollar sales volume. It also manufactured numerous other products, including fibre drums, flexible packaging materials, plastic products (including plastic containers), paper cups and plates, crown caps, vacuum type metal caps, can closing machinery, and special defense items.

By 1955 Continental had 72 plants for the manufacture of its products at various locations throughout the United States. It also had plants in seven foreign countries, including Canada. Forty manufactured metal cans. Approximately 45,000 persons were in its employ.

Its net sales and operating revenues and net income for the years 1953, 1954 and 1955, in thousands of dollars, were:

	Net Sales and Operating Revenues	Net Income
1953	\$554,436.	\$15,680.
1954	616,163.	20,736.
1955	666,266.	24,172.

[fol. 4244] Its total assets as of December 31, 1955 were \$381,917,000.

Including the Hazel-Atlas, Gair and White Cap acquisitions, for the year 1956 Continental had net sales and operating revenues of \$1,010,268,000, and net income of \$43,143,000, with total assets as of December 31, 1956 of \$633,706,000.

Comparative 1955 combined figures for these four companies prior to acquisition, show net sales and operating revenues of \$929,428,000, net income of \$38,693,000, and total assets as of December 31, 1955 of \$568,850,000.

(2) Hazel-Atlas

Hazel-Atlas was a West Virginia corporation with its principal office in Wheeling, West Virginia. It was organized prior to 1900 and, as a result of its acquisition by Continental, was dissolved on September 21, 1956.

Its principal business was the manufacture and sale of glass containers of various types to industrial consumers, and of glass jars for home canning, both largely of the wide mouthed variety. It also manufactured glass tumblers, tableware, kitchenware, glass articles of special design for industrial use, screw type metal closures and closures for home canning glass jars. It appears to have been the third largest glass container manufacturer in the United [fol. 4245] States.

Hazel-Atlas operated plants at thirteen locations in various parts of the country, principally in the western Pennsylvania, West Virginia and eastern Ohio area, and had warehouses. Its net sales and net income in 1953, 1954 and 1955, in thousands of dollars were:

	Net Sales	Net Income
1953	\$79,250.	\$3,112.
1954	79,174.	3,629.
1955	79,920.	3,393.

Its total assets as of December 31, 1955 were \$37,884,000.

After acquisition by Continental the operations conducted by Hazel-Atlas were continued by the Hazel-Atlas Division of Continental and its operating figures were included in Continental financial statements. It does not

appear that there was any substantial change in the volume or character of business done by the Hazel-Atlas Division in the period between its acquisition and the trial.

Prior to its acquisition Hazel-Atlas did not manufacture or sell metal cans, plastic or paper containers, vacuum type metal closures, crown caps or any other product manufactured or sold by Continental or its subsidiaries.

On the other hand, Continental did not, directly or [fol. 4246] through subsidiaries, manufacture or sell glass containers or any other glass products, screw type metal closures, or any product manufactured or sold by Hazel-Atlas. It is uncontroverted that the two merging companies manufactured and sold no identical products.

III

The types of products and the separate industries involved

This case is concerned with three basic types of containers—those made of metal, glass and plastic. They are of a variety of shapes, sizes and end uses.

The three types of containers are produced by three recognized separate industries, each with its own structure and pattern, the metal can industry and the plastic container industry in which Continental was engaged, and the glass container industry in which Hazel-Atlas was engaged.²³

[fol. 4247] In addition to the three types of containers the case also is concerned with three different kinds of metal closures used to close or seal products packed in containers. They are crown caps, vacuum type closures and screw and lug type closures. Continental produced crown caps and vacuum type closures and Hazel-Atlas pro-

²³ It may be noted that reference will be made to what is claimed to be an all encompassing "packaging industry." However, as will be pointed out, the evidence wholly failed to establish that there is any such relevant product market in this case. Nor was it established that there is any recognized separate industry or relevant product market comprising all metal, glass and plastic containers, or any general combinations of them.

duced screw and lug type closures. Closures will be discussed separately though there is no separate metal closure industry.²⁴

(1) Basic types of products

(a) Metal cans

For Census Bureau statistical purposes the metal can is defined "as a single-walled container constructed wholly of tin plate, terne plate, blackplate or waste plate designed for packing products."²⁵ Such cans have distinct physical characteristics. They are rigid and unbreakable, but can be dented. Unlike plastic containers, they can be hermetically sealed and are impermeable to gases. They can be heat processed faster and are lighter than glass containers, and are not chemically inert.

The basic raw material used in can manufacture is tin- [fol. 4248] coated steel (tin plate), but some cans are made from uncoated steel (blackplate) or aluminum. Other raw materials include soldering compounds, paints, varnishes, lithographing inks, paper and cartons for packaging. The major factor in determining can prices is the cost of tin plate. Cans are generally sold f.o.b. the manufacturer's plant.

The products packed in metal cans are extremely numerous and varied and in fact cover a substantial segment of American industrial and agricultural production. However, for statistical purposes the Census Bureau has set up thirteen different general categories of metal cans all in terms of end use. The Bureau collects statistics from metal can manufacturers as to the amount of metal each consumes in the manufacture of cans in each of these categories.²⁶

²⁴ See discussion *infra* pp. 35-40.

²⁵ G-1203. This definition excludes steel pails which are defined as "single-walled shipping containers having capacities of 1-12 gallons inclusive that are cylindrically constructed of steel sheet of 29 gauge and heavier."

²⁶ Under the regulations of the Bureau metal can manufacturers report the number of base boxes of steel consumed in the manufacture of cans in each category. A base box is a unit of area measurement. The Bureau does not pre-

The thirteen Census Bureau end use categories are fruit [fol. 4249] and vegetables (including juice); evaporated and condensed milk; other dairy products; meat (including poultry); fish and seafood; coffee; lard and shortening; soft drink; beer; pet food; oil open-top (1 quart and 5 quart) all other food (including soup and baby food cans); and all other nonfood.²⁷ A number of these categories plainly include a great number and variety of specific end uses for which no accurate further breakdowns are available.

Among the principal types of cans are "Packers" cans and "General Line" cans. "Packers" cans are normally used for food products though they are used for many non-food products as well. They are round open-top or sanitary cans. The packer after filling the can puts the top on.

"General Line" cans are used both for food and nonfood products and have different kinds of fittings and different shapes. There are other types of cans also. All types of cans are manufactured from the same raw materials by the same production processes and with the same equipment.

Cans used for one type of product may be used for other types of products also, but they usually have different linings for different products. For example, substantially [fol. 4250] the same open-top can is used for food, pet food, motor oil and other non-food products.

scribe which specific end products fit into each category and this is left to the discretion of the individual reporting manufacturer.

The base box figures so reported are then converted by the Bureau into short tons of steel on the basis of conversion factors for each category. The comparative production figures in this record are those based on short tons of steel used in the production of metal cans reported by manufacturers as belonging in the various census categories of metal cans shipped.

There are no published figures of the actual number of cans shipped and there are wide differences in the product mixes in terms of sizes of cans produced by the various manufacturers.

(b) Glass containers

There are two basic types of glass containers, the wide mouth and the narrow neck container.

Glass containers have distinct physical characteristics. They are rigid, chemically inert and impermeable to gases; can be hermetically sealed but are readily broken; and, unlike many cans, can be easily resealed after they have been opened. Glass containers are heavier than other types of containers and must be carefully packed for shipment to avoid breakage. Costs of shipment are therefore higher. They take longer to heat process than cans. Many narrow necked glass containers are suitable for re-use by bottlers and are returned by consumers to the bottler for such re-use.

Glass containers used for one type of product are often identical with containers used for widely dissimilar products. Thus, the same wide mouthed glass jar is used for peanut butter and silver polish, and the same narrow necked glass bottle is used for vinegar and liquid starch.

The basic raw materials used in the manufacture of glass [fol. 4251] containers are sand, lime and soda ash. Also required are the necessary labeling and coloring materials. Because of the need for careful packing for shipment to customers, corrugated cartons are used to pack the containers.

Cost of labor is the major factor in determining glass container prices. The corrugated shipping container represents 18-20% of the cost of the final product as shipped. Glass containers are generally sold on a delivered price basis with freight included in the price.

The Census Bureau publishes data as to glass container shipments. These statistics are grouped, in terms of end use, in the following fourteen categories:²⁸

²⁸ The statistics are collected for the Bureau by the industry trade association, the Glass Container Manufacturers Institute, from its member manufacturers and are used as the industry totals. A number of manufacturers are not members of the Institute. Statistics are prepared on a physical volume basis measured in gross. They show container shipments by product groups as classified by the Institute with a basic division between narrow neck and

Narrow Neck: Food; medicinal and health supplies; household and industrial; toiletries and cosmetics; beverage, returnable; beverage, non-returnable; beer, returnable; beer, non-returnable; liquor; and wine.

Wide Mouth: Food, including fruit jars and jelly glasses; [fol. 4252] medicinal and health supplies; household and industrial; toiletries and cosmetics; dairy products; and packer's tumblers.

Each of these general end use categories is composed of hundreds of individual end use items. But no detailed breakdown figures on the end use categories are available.

(c) Plastic containers

Plastic containers are manufactured by various methods including blow molding and injection molding. They are made of such raw materials as polyethylene and polystyrene. Prices are principally determined by the price of raw materials. Some are sold on a delivered price basis and some are not.

Plastic containers have distinct physical characteristics. They are neither rigid nor transparent. They are not impermeable to gases, and cannot be hermetically sealed. Such containers are virtually unbreakable, but they cannot contain internal pressure and their ability to hold a vacuum is limited. They are lighter in weight than glass containers of equal capacity. They are electrostatic and therefore attract dust.

Plastic containers are of many shapes and sizes and include such items as bottles, jars, tubes, vials and bags. They [fol. 4253] are used to package many kinds of foods, drugs, cosmetics, detergents and industrial products including such widely diverse products as rust removers, baby lotions, ice cream, insect repellents, shoe polishes, pills, water, and deodorants.

wide mouth containers. It may be noted that the Institute's descriptions of the different end use categories (G-1205) are slightly different from those which Census apparently used. The Government relied on the latter, however, and I have used them here.

(2) Separate industries

(a) The metal can industry

This industry is composed of companies engaged in the manufacture of metal cans used to pack a large number and wide variety of different products. Most of the companies in the industry manufacture cans for sale to industrial and agricultural processing customers, who, in turn, use them to pack their own products for marketing. Some companies, on the other hand, the so-called captive companies, produce cans for their own use in packing their own products.²⁹ Some of the captive companies produce cans for their own use and also sell to other users.³⁰

A number of metal can manufacturers also manufacture tin-ware and other tin plate products. Some also produce [fol. 4254] other kinds of packaging materials and incidental items.

There are no reliable figures in the record as to the number of companies engaged in the manufacture of metal cans in the United States. Estimates run from seventy-five to over ninety. The largest is American Can Company. Continental is second. Either Campbell Soup (a captive manufacturer) or National Can Company is third. Other important manufacturers include Crown Cork & Seal Company, Heekin Can Company, J. L. Clark Company, Carnation Milk and Sherwin-Williams. American Can, Continental, National Can and Crown Cork & Seal, among others, sell cans throughout the country. Most of the other companies operate on a regional basis.

American Can, the industry leader, like Continental, manufactures a variety of products used by packers. In addition to metal cans it produces fibre, plastic and paper containers. It also manufactures machines for filling and closing both metal and fibre containers. Various other com-

²⁹ Such companies include Campbell Soup Company, H. J. Heinz Company, Hollingshead Corporation, Pet Milk Company and Otoe Food Products Company.

³⁰ Among these are Armstrong Paint Company, Sherwin-Williams Company, The Borden Company and Carnation Milk.

panies manufacturing metal cans also have diversified product lines.

In 1955 American Can shipped approximately 38% of the metal cans sold in the United States. Continental's shipments amounted to approximately 33%. American's [fol. 4255] shipments exceeded Continental's in nine of the thirteen Census categories. Together these two companies accounted for approximately 71% of the total metal can shipments in the country.

It appears that can companies sell their products directly to users. There is nothing to indicate that there are any jobbers or wholesalers who purchase cans for resale to their own customers and it may be assumed that there are none.

The trade association for this industry is the Can Manufacturers Institute. Its forty-nine members, limited to can manufacturers, include American, Continental, National, Crown, Heekin and Clark. Voting rights and representation on the Board are determined by the number of employees of the member companies.

The Institute has a professional staff of three. Its activities, carried on largely through committees, deal with various technical industry problems such as industrial relations, traffic, safety and research and include a limited amount of promotion on the advantages of the metal can.

A promotion and advertising program, jointly financed by the members of the Institute and tin plate manufacturers who supply raw materials for can manufacture, was carried on at one time. The program was dropped when the tin plate manufacturers withdrew financial support [fol. 4256] port. A recent program of advertising to promote soft drinks in cans was not conducted by the Institute but was financed exclusively by tin plate manufacturers.

Since 1957 the Institute has done no advertising and its only promotion work has been in connection with the celebration of the sesquicentennial of the tin can. The extent of the activities of the Institute and the effects, if any, which such activities may have upon the industry or upon the public are not reflected in the record.

The annual production of cans has increased substantially since the end of World War II when the industry

resumed its normal rate of growth after wartime curtailment of metal supply. Its facilities have also expanded substantially and continue to do so.

Since 1950 American and Continental have substantially maintained their market positions as the number one and number two companies in the industry respectively. However, the medium sized producers, with assets of less than \$100,000,000 have not only participated in the growth of the industry but have increased their share in the market. The evidence did not show that there has been any reduction in the number of companies manufacturing cans since the Hazel-Atlas acquisition and, in fact, the number of companies engaged in the "Tin Can and other tinware [fol. 4257] industry"³¹ was greater in 1957 than in 1950.

It did not appear that the initial capital investment needed to embark upon can manufacture is unreasonably high, that there is any obstacle to obtaining whatever technical knowledge is necessary or that there are any patent barriers to entry into the industry. Raw materials are plentiful and readily available.

There was little in the record as to the shape and pattern of the industry in terms of such factors as the markets which it serves, the nature of the competition which exists in such markets, pricing practices, its methods of buying, selling and merchandizing, the supply and demand picture or similar matters.

From all that appears the industry is prosperous, healthy and highly competitive. Competition has been and remains keen and vigorous. What the record presents is a generalized picture of a large, strong, and relatively stable but expanding metal can industry.

(b) The glass container industry.

This well-defined and recognized separate industry is composed of companies engaged in the manufacture of glass containers sold to industrial and agricultural customers for use in packing their own products. Glass containers are also sold to the public for home preserving.

[fol. 4258]. The industry produces glass containers of a

³¹ This is an Internal Revenue Service classification.

wide variety of types, shapes, sizes and colors for numerous end uses. A number of companies, including Owens-Illinois Glass Company and Hazel-Atlas, also produce glass table and kitchen ware and other glass products. Some also produce other products used by packers.

There are at least forty-two companies engaged in the manufacture of glass containers. By far the largest is Owens-Illinois Glass Company with almost 35% of the total production and with annual sales in 1955 of some \$370,000,000 and earnings of some \$27,000,000.²² Anchor-Hocking Glass Company, Hazel-Atlas and Knox Glass, Inc. appear to follow in that order. The Hazel-Atlas share of the glass container market in 1955 was about 9.6% with net sales of some \$79,000,000 and net earnings of approximately \$3,000,000.

Owens-Illinois, in addition to glass containers, manufactures plastic containers, metal and plastic closures, corrugated shipping containers, various types of fibre and paperboard containers, closure machinery and a wide variety of other glass and plastic products. Other companies, such as Anchor-Hocking, also have diversified lines.

There are at least twenty companies in the industry with sales above or in the neighborhood of \$10,000,000 a year. Most of these companies have been expanding their facilities and production and increasing sales at a rapid rate. There is nothing to indicate that smaller companies are not also prospering.

Five companies in the industry sell throughout the country. They are Owens-Illinois, Anchor-Hocking, Thatcher Glass Mfg. Co., Ball Bros. Co., Inc., and Hazel-Atlas. Other companies sell on a regional basis.

The trade association for the industry is the Glass Container Manufacturers Institute. Its membership consists of thirty-six glass container manufacturers, six closure

²² These figures apparently include all of the products manufactured by Owens-Illinois and are not confined to glass container sales. The Hazel-Atlas figures are also inclusive but Hazel-Atlas, unlike Owens-Illinois, did not have widely diversified product lines.

manufacturers and twenty suppliers of raw materials and equipment.²² Dues are assessed on the basis of sales volume and the Board of Trustees is composed of employees of the member companies.

The Institute has about forty-five paid employees. Its activities are carried on by standing committees. Members of the professional staff are assigned to each committee.

Activities include market research and promotion, the collection and dissemination of statistics concerning the industry, technical research, package design and specifications, the development of standard testing and quality control procedures, problems of freight rates, labor relations, and liaison work with government. The Institute does advertising and publicity for the industry but the evidence does not indicate how substantial this is or how effective such activities are.

As in the case of the metal can industry, there is virtually nothing in the record of significance regarding such matters as the markets served by the industry, the nature of the competition which exists in such markets, the problems faced by its customers, methods of selling and merchandizing, price structure or pricing practices, the supply and demand picture, or similar matters.

During World War II the tin place supply was greatly curtailed and the glass container industry was able to make substantial advances at the expense of the metal can industry. Since the war the glass container industry has continued its substantial growth and expansion and this process has not abated since the Hazel-Atlas acquisition. The growth of the glass industry has been more rapid than [fol. 4261] that of the can industry.

Numerous technical improvements have been made in the glass container which have increased its strength, resistance to breakage and overall utility, and have lightened

²² A number of manufacturers are not members of the Institute, including Star City Glass Co., Wheaton Glass Co., T. C. Wheaton Co., Kerr Glass Manufacturing Co., Underwood Glass Co., Arkansas Glass Co., and Gallo Glass Co.

weight. These improvements have contributed significantly to the growth of the industry.

There appears to be no difficulty in entering the glass container industry and a number of new companies have recently entered and have had successful operations. There has been a continuous expansion of facilities by both large and small companies through new plant construction or additions to existing plants.

There was no evidence that the initial capital investment needed to enter the industry was unreasonably high or that there is any obstacle to obtaining whatever technical knowledge or facilities are necessary. Nor are there any patent barriers to entry. Raw materials are plentiful and readily available, as are shipping containers.

The industry is prosperous, healthy and highly competitive. Here again is a generalized picture of a large, strong, and rapidly expanding industry in which competition has been and remains keen and vigorous.

[fol. 4262] (c) The plastic container industry

The plastic container industry is relatively new. It got under way in the mid 1940's. The industry has since grown rapidly and is still undergoing rapid expansion. Neither the size and scope of the industry nor the respective positions of Continental and other manufacturers in it can be determined with any reasonable degree of accuracy from the evidence in this record.

The larger companies in the industry include Plax Corporation, Injection Molding Company, American Can, Continental, Royal Manufacturing Company, Inc., Owens-Illinois, Wheaton Plastics Company and Foster-Grant Company, Inc.

The dollar sales volume of the industry is small compared with that of the metal can and glass container industries. Plax, the largest producer, had plastic container sales in 1959 of about \$12,000,000, which it estimated to be 30% to 40% of such sales in the United States.

In 1955 Continental's sales of plastic containers amounted to \$2,400,000, and according to its estimate it shipped approximately 9.3% of the plastic squeeze bottles sold in the United States in that year.

There are apparently thousands of small companies engaged in the manufacture of plastic containers. Some use [fol. 4263] the blow molding method of manufacture and others use injection molding.

Among the many types of plastic packaging materials produced by companies in the industry are bottles, jars, vials, boxes, folding cartons, tubs, tubes, carboys, tubes with metal ends, film and other flexible materials and bags. These containers are sold to a wide variety of industrial customers who pack their own products.

There is a Plastic Bottle and Tube Manufacturers Institute, organized in 1957, which is a division of the Society of the Plastics Industry, Inc. Its members are American Can, Continental, Foster-Grant, Injection Molding, Plax and Royal.

There was a paucity of information in the record about the activities of this Institute. It appears to collect statistics from its members, some of which apparently are published by the Department of Commerce but these figures are not in the record. Such statistics as are collected by the Institute concerning individual companies are destroyed when received and only overall totals are maintained. The Bureau of Census does not collect or publish statistics relating to the production of plastic containers.

There is no showing that the initial capital investment needed to enter manufacture of plastic containers is high. [fol. 4264] Nor are there any technical obstacles to such manufacture. Raw materials and labor are readily and plentifully available and patents constitute no barrier to entry into this field.

The number of companies manufacturing plastic containers is on the increase and has continued to increase since the acquisition. The industry is rapidly expanding and competition is keen and vigorous. There are no universe figures for the industry in the record and such statistics as there are concerning it are wholly unreliable and furnish no basis from which informed conclusions can be drawn.

This relatively new and expanding industry plainly has substantial potential. However, its overall dimensions and the extent to which it may be in competition with the

glass container and metal can industries remain, at best, obscure.

(i) Closures

The term "closures" refers to a miscellany of devices used by packers to close and seal containers in which products are packed. The various types include crown caps, vacuum type closures, screw and lug type closures, paper and foil caps, and closures for home canning. Some are made of tin plate, some of aluminum or plastic, and others of paper or foil.

As I mentioned earlier, prior to the acquisition Continental [fol. 4265] produced crown caps and, after acquiring White Cap Company, vacuum type metal closures as well through that subsidiary. Hazel-Atlas did not manufacture either of these products. It manufactured screw and lug type metal closures and home canning closures. Continental did not.

(a) Crown caps are made of tin plate with cork or composition lining. They are used to close narrow neck glass bottles, primarily for beer and carbonated beverages. They are applied to the bottle by crimping and not by lugs or threads. They are not sold in competition with screw or vacuum type metal closures.

The largest producer of crown caps was Crown Cork & Seal Company, which was also a metal can producer. Other producers, in addition to Continental, were Armstrong Cork and Guttman. Though Anchor-Hocking and Owens-Illinois did not manufacture crown caps at the time of the acquisition, both of them had been for some time large manufacturers of beer bottles and beverage bottles.

In 1956 Continental shipped 17.1% of the crown caps sold in the United States, in 1957 18.4% and in 1958 18.5%.

(b) Vacuum type metal closures are made of tin plate or aluminum, with various kinds of linings. They may be of the side-seal, top-seal (or twist-off) or roll-on varieties. [fol. 4266] They are used on glass containers almost entirely for packing food.

Vacuum type metal closures are applied by closing machines which create a vacuum in the head space of the

container. The products to be packed are sterilized and steam is inserted into the area remaining between the food and the top of the jar, thus exhausting the air in the head space. The closure is then applied and when the product cools and the steam evaporates a vacuum seal is created.

Closing machines for the application of vacuum metal closures are leased or sold to packers by Continental through its White Cap Division and also by Owens-Illinois, Anchor-Hocking and Aluminum Company of America. Vacuum closing machines for a particular type of vacuum closure made by different manufacturers, are interchangeable with similar machines made by other manufacturers, or may be made so with relatively minor modifications. Such machines cannot be used to apply screw type metal closures and they operate at much higher speeds than machines for the application of screw type closures.

The White Cap Company, now a subsidiary of Continental, is the leading manufacturer of vacuum type closures. Other manufacturers include Anchor-Hocking, Owens-Illinois and Crown Cork & Seal. In 1956 White Cap produced approximately 60% of the vacuum closures made from tin [fol. 4267] plate. A recent development, apparently pioneered by White Cap, is the twist-off vacuum closure which is used for the same general purposes as other vacuum closures.

(c) Some screw and lug type metal closures are made of tin plate with various kinds of linings. Others are made of aluminum or plastic. It does not appear that screw and lug type closures made of different materials have end uses substantially different from one another. Closures of this type are normally used on glass containers.

These closures engage the glass container by screwing into continuous threads in the neck of the container. They cannot be used where a vacuum is required and in general are not used for food products for which vacuum metal closures are needed because of spoilage problems. Screw and lug type closures are used on both food and non-food products.

There are at least 18 companies manufacturing screw and lug type metal closures, including Owens-Illinois, Crown, Ball Bros. and Hazel-Atlas. In 1958 Hazel-Atlas produced

approximately 4.7% of the screw and lug type metal closures shipped in the United States. There are several companies, including Owens-Illinois, which manufactured both metal and plastic type screw and lug type closures, the [fol. 4268] uses of which appear to be substantially interchangeable. From 24 to 36 companies make plastic screw type closures.

The statistics in the record relating to closures do not include metal closures used in home canning, aluminum closures, plastic closures or paper caps, though Hazel-Atlas made home canning closures as well as screw and lug type closures for commercial packing. With the exception of home canning jars sold with closures attached, glass containers and closures for them are sold separately. Closures are sold by the manufacturer directly to packers and there appear to be no wholesalers or jobbers of these products. Closure customers generally have multiple sources of supply. There is no evidence that prices of one type of closure have any effect on the sales volume of any other types.

There is no shortage of raw materials necessary to manufacture closures. There was no showing that there were any substantial obstacles to entry into any of the closure fields.

Crown caps, vacuum type closures and screw and lug type closures have in the main quite different uses and do not significantly compete with one another. However, competition within each of the respective screw type, vacuum type and crown cap fields has been and remains keen and [fol. 4269] vigorous and there does not appear to have been any significant diminution in the number of companies engaged in these respective fields either before or after the acquisition.

IV

The contentions of the parties.

- (1) Lines of commerce and sections of the country claimed to be relevant.

A year and a half before the commencement of the trial, the Government, in answer to defendants' interrogatories, specified with particularity ten separate lines of commerce which it claimed were adversely affected by the acquisition.

under attack. The lines of commerce so specified remained unchanged throughout the exhaustive pre-trial proceedings in which the issues to be tried were carefully limited and defined, and during the six weeks of the trial itself.

The ten lines of commerce are as follows:³⁴

- [fol. 4270] 1. The packaging industry.
2. The can industry.
3. The glass container industry.
4. Metal closures.
5. Containers for the beer industry.
6. Containers for the soft drink industry.
7. Containers for the canning industry.
8. Containers for the toiletries and cosmetic industry.
9. Containers for the medicine and health industry.
10. Containers for the household and chemical industry.

The Government contended that the relevant geographic market in which adverse effects of the acquisition were felt in each of these ten lines of commerce was the United States as a whole. It contended also that in lines of commerce numbered 2, 3, 5, 6, 7, 8, 9 and 10 there were adverse effects in two separate sections of the country, as well, (a) the United States east of the Rocky Mountains, and (b) the United States west of the Rocky Mountains.

No discussion of the attempted distinction between the areas east and west of the Rocky Mountains is necessary here. The evidence wholly failed to establish that, in the context of this case, there were any differences between

³⁴ The lines of commerce are listed here in what seems to me to be the logical order in which they should be discussed. The order in which they were listed by the Government in its interrogatories, which I followed in my oral decision, was as follows:

1. Containers for the canning industry.
2. Containers for the beer industry.
3. Containers for the soft drink industry.
4. Containers for the toiletries and cosmetics industry.
5. Containers for the medicine and health industry.
6. Containers for the household and chemical industry.
7. The can industry.
8. The glass container industry.
9. Metal closures.
10. The packaging industry.

these areas or between either of them and the United States as a whole indicating that they constituted economically significant separate geographic markets in any [fol. 4271] of the lines of commerce specified. Nor was there evidence that such effects of the acquisition as might be felt were any different in different sections of the country. The only "section" of the country which was relevant was the United States as a whole. That is the geographic market with which we are concerned here.

The defendants agreed with the Government that the can industry and the glass industry were separate lines of commerce for Section 7 purposes. They contended, however, that the other eight lines of commerce specified did not in fact exist and that there were no such separate relevant product markets or sub-markets.

Hazel-Atlas, said the defendants, was engaged in two lines of commerce, glass containers and screw and lug type metal closures and these were the only relevant markets in so far as it was concerned. They said further that the only relevant product markets in which Continental was engaged were metal cans, plastic bottles, crown caps and vacuum type closures.

Thus defendants contended that there were but six separate and distinct relevant lines of commerce or product markets. Moreover, they took the position that the lines of commerce in which Hazel-Atlas and Continental were respectively engaged, were quite different and did not overlap to any significant degree.

[fol. 4272] (2) Claims as to anti-competitive effects.

The Government conceded that it had no proof that any person or firm, seller or buyer, suffered any actual injury as a result of this acquisition, although the trial took place more than three and a half years after it occurred. There were no complaining witnesses. None of the 78 witnesses whom the Government placed on the stand testified to any actual anti-competitive effects or tendency to monopoly. There was no evidence of actual anti-competitive effects or tendency to monopoly in this record.

The Government's case was predicated upon what it claimed were potential anti-competitive effects.

As its standards for determining whether such effects

were reasonably probable, the Government advanced four criteria referred to in the House Report on the 1950 amendment to the section.³⁵ It claimed that the acquisition (1) had eliminated in whole or in material part the competitive activity of Hazel-Atlas which had been a substantial factor in competition with Continental; (2) had increased the relative size of Continental to such point that its [fol. 4273] advantage over its competitors threatened to be decisive; (3) had resulted in an undue reduction in the number of competing enterprises; and (4) had established relationships between buyers and sellers which deprived their rivals of a fair opportunity to compete.

The Government also stressed a statement in the Senate Report on the 1950 amendment that the statute was intended "to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding . . ."³⁶ It emphasized prior acquisitions by Continental of companies in the metal can and other fields, and urged that when Continental acquired Hazel-Atlas, the process of acquisition had reached a stage where it was reasonably probable that anti-competitive effects would occur and that the acquisition was therefore unlawful.

The Government took the position that, while the anti-competitive effects referred to in the House Report might not be apparent presently, it was probable that they would occur in the future in each of the lines of commerce which it attempted to delineate.

[fol. 4274] Defendants, on the other hand, while conceding that the criteria referred to in the House Report might be relevant considerations in an appropriate Section 7 case and that, in appropriate circumstances, a continuing process of cumulative acquisition might become unlawful, insisted that there was no substitute for a showing that there be reasonable probability of substantial anti-competitive effects or tendency to monopolize in the product markets relevant to the case under consideration. They pointed out that the intention of Congress to cope with restraints of trade and monopolistic tendencies in their

³⁵ H. R. Rep. No. 1191, 81st Cong., 1st Sess., 8.

³⁶ S. Rep. No. 1775, 81st Cong., 2nd Sess. 4.

incipiency was carried out by the concept of reasonable probability embodied in the statute and that this was the sole standard to be applied to the particular facts of each case.

Defendants also pointed out that Section 7 cannot be applied mechanically or quantitatively but that each case must be decided on its own facts. They maintained, moreover, that in any event, the Government could not prevail since there was a complete failure of proof here.

They urged that Hazel-Atlas and Continental did not compete with one another to any significant degree and there was no reasonable probability that they ever would; that the merger was utterly devoid of anti-competitive [fol. 4275] significance; and that it had not resulted and there was no probability that it would result in any substantial lessening of competition or tendency toward monopoly in any of the lines of commerce delineated by the Government or in any other lines of commerce.

V

Uncommon features of the case

This case does not fit into any of the classic anti-trust patterns. It deals with three separate and distinct industries manufacturing separate and distinct types of products.

As the earlier discussion indicates, each type of container is made from different raw materials and each had different physical characteristics and properties. Different plant and machinery are required for each and the processes of manufacture are different. The different types of containers manufactured by these different industries are of wide varieties of sizes and shapes and are put to hundreds, if not thousands, of different end uses.

Concededly there was substantial and vigorous inter-industry competition between these three industries and between various of the products which they manufactured. Metal can, glass container and plastic container manufacturers were each seeking to enlarge their sales to the thousands of packers of hundreds of varieties of food, chemical, toiletry and industrial products, ranging from ripe olives to fruit juices to tuna fish to smoked

tongue; from maple syrup to pet food to coffee; from embalming fluid to floor wax to nail polish to aspirin to veterinary supplies, to take examples at random.

Each industry and each of the manufacturers within it was seeking to improve their products so that they would appeal to new customers or hold old ones. Hazel-Atlas and Continental were part of this overall industrial pattern, each in a recognized separate industry producing distinct products but engaged in inter-industry competition for the favor of various end users of their products.

It does not necessarily follow from this, however, that the acquisition of Hazel-Atlas by Continental falls within the ambit of Section 7 of the Clayton Act. That section of the act deals specifically with relevant product markets and the lessening of competition within them. The fact that there is inter-industry or inter-product competition between metal, glass and plastic containers is not determinative of the metes and bounds of a relevant product market.

[fol. 4277] As the Supreme Court said in the *Cellophane* case:³⁷

"Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. For example, one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different. This is the interindustry competition emphasized by some economists. See Lilienthal, *Big Business*, c. 5."³⁸

³⁷ *United States v. E. I. duPont de Nemours & Co. (Cellophane)*, 351 U.S. 377, 893 (1956). See also *Kansas City Star Company v. United States*, 240 F. 2d 643 (8 Cir. 1957), cert. den. 354 U.S. 923 (1957).

³⁸ Illustrations of inter-industry competition given in Lilienthal, *Big Business: A New Era* (1952), c. 5, referred to by Mr. Justice Reed, include copper and aluminum; coal and oil; cotton, wool and synthetic fibres; trucks, automo-

Thus the relevant product market for anti-trust purposes by no means includes all substitutes. In this connection the Court said in the *Times-Picayune* case:³⁹

"For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable [fol. 4278] variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small."

This appears to be what the Court had in mind in *Brown Shoe* when it said:⁴⁰

"The outer boundaries of a product market are determined by the *reasonable* interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." (Emphasis added.)

In this case the circle referred to in *Times-Picayune* cannot be drawn to include within the boundaries of a single product market the metal can, glass container and plastic container industries and their wide variety of products. Attempts by the Government here to combine these separate industries and their products or to combine separate and distinct products from separate and distinct industries into single product markets necessarily failed because appropriate distinctions were not made between inter-industry or overall commodity competition and the type of competition between products with reasonable interchangeability of use and cross-elasticity of demand which has Clayton Act significance.

[fol. 4279] The boundaries of a product market or sub-market may only be determined "by examining such prac-

biles, buses and airplanes; iron, copper and plastic pipe; glass, concrete, brick and asbestos building and insulation materials, and even glass, cans, and plastic bottles.

³⁹ *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) at p. 612, fn. 31.

⁴⁰ *Brown Shoe Co. v. United States*, *supra*, p. 325.

tical indicia as industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."⁴¹

Nevertheless, the Government here has made an attempt to establish a product market embracing all of these separate industries and products and many more in the line of commerce which it denominated as the packaging industry. The theory upon which it proceeded on this line of commerce is illustrative of its failure to make the distinctions I have pointed out.⁴²

Moreover, with the exception of the lines of commerce denominated as the metal can industry and the glass container industry, each of which were conceded to be separate product markets and the line denominated "containers for the beer industry" which I have found to be a separate product market, the Government also ignored these concepts in attempting to combine products produced by [fol. 4280] separate industries, which were not shown to have reasonable interchangeability of use or cross-elasticity of demand, into relevant lines of commerce. Examination of such practical indicia for determining product markets as were in the record did not establish that there were such lines of commerce. These lines of commerce were artificially carved out by the Government and did not conform to the realities of the marketplace.

We therefore do not have here the pattern of a horizontal combination between two companies which manufacture or sell the same products, as the Government seemed to assume. Nor are we concerned with the pattern of a vertical combination. Neither Continental nor Hazel-Atlas was engaged in any essential step in the processing, manufacture or sale of products made or used by the other.⁴³

⁴¹ Brown Shoe Co. v. United States, *supra*, p. 325.

⁴² See discussion of "The packaging industry", pp. 66 to 70 *infra*.

⁴³ But see discussion of corrugated shipping cartons, *infra*, pp. 81-8 and containers for the beer industry, *infra*, pp. 87-94.

What we have here, basically, is a conglomerate combination in which one company in two separate industries combined with another in a third industry for the purpose of establishing a diversified line of products suitable for a variety of end uses to be sold to a wide range of customers with differing packing requirements.

[fol. 4281] "Such a merger . . . does not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger, nor does it have the effect of automatically eliminating a competitor as in a horizontal merger." "

Here the Government moved into virtually uncharted Section 7 territory. In the twelve years since Section 7 was amended there are apparently only two other cases raising this exceptional problem. They are *United States v. General Motors (Euclid Road Machinery)* which is currently pending in the District Court for the Northern District of Ohio, and the *Procter & Gamble* case before the Federal Trade Commission which has just been cited. A third case, *United States v. General Dynamics*, filed in this district on November 8, 1962 and as yet undetermined, may also involve the same problem to some extent.

To complete the background I should add that I have been unable to find any case dealing with a pattern of inter-industry and inter-commodity competition comparable to that which exists here nor in which the diversification of products, industries and consumers is so pervasive.

This is not to suggest that enforcement of Section 7 [fol. 4282] may not be extended beyond the range of any of the cases thus far decided. For, as both *Brown Shoe* and the legislative history which it reviews make clear, Section 7 is applicable to conglomerate mergers where the facts warrant.⁴⁵ But there must be evidence that the facts warrant such application.

Understandably the case of a conglomerate merger set in such a complicated inter-industry pattern as this presented great difficulties of proof for the Government. But

⁴⁴ *Procter & Gamble Co.*, 3 C.C.H. 1961 Trade Reg. Reports (¶ 15,245; F.T.C. Orders), at p. 20,257.

⁴⁵ *Brown Shoe Co. v. United States*, *supra*, p. 317.

that does not mean that the Government's burden was lessened or that it was relieved from the obligation of establishing relevant product markets or of showing reasonable probability of substantial anti-competitive effects in one or more of them as a result of the acquisition. In fact, in the case of a conglomerate merger such as this, where such a wide diversity of factors bear on questions of relevant markets and anti-competitive effects within them, the Government must be at pains to examine in detail all practical indicia which might bear on both questions.⁴⁴

[fol. 4283] In the case at bar the Government not only failed to do this but the evidence concerning such indicia as were examined was woefully inadequate. Even assuming that the theory upon which the Government sought to construct its line of commerce for the packaging industry, for example, were tenable, it conspicuously failed to adduce any evidence whatsoever to support its theory, as I shall point out in detail later. In the lines of commerce denominated containers for the soft drink, canning, toiletry and cosmetic, medicine and health, and household and chemical industries, moreover, its proof was also altogether deficient as to practical indicia showing that such product markets as these in fact exist. It failed to establish that these were relevant lines of commerce.

The Government's failure of proof was not confined to its attempted delineation of end use and other lines of com-

⁴⁴ The comments of the Federal Trade Commission with respect to the standards of proof required in such a situation are not inappropriate:

" . . . the same tests apply as in any other matter coming within the purview of Section 7, but since a conglomerate acquisition does not have the above-mentioned 'automatic' effects of a vertical or horizontal merger, such a determination is necessarily difficult to make from a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition and to the pre-merger status of the acquired and acquiring corporations. Consequently, a consideration of post-acquisition factors is appropriate [as well]." Procter & Gamble Co., *supra*, p. 20,258.

merce. Its failure was equally evident with respect to anti-competitive effects in the can industry, the glass industry and the beer container lines of commerce which it was successful in establishing.

[fol. 4284] Plainly, in order to make out a case under the Act the Government was required to show either that the acquisition had actually resulted in a significant diminution of the vigor of competition or that there was reasonable probability that it would do so. Unless it showed that there were actual anti-competitive effects of a substantial nature, which it did not, the reasonable probability test had to be met. As I have mentioned, there is no evidence of actual anti-competitive effects in this record, substantial or otherwise and the Government did not proceed on that theory.

Thus, the Government had to establish the reasonable probability of substantial anti-competitive effects from this acquisition and it had to do so under the facts and circumstances of this case and within the framework and context of the industries and markets specifically involved.

The Government was not able to sustain this burden. Its case was based on what it claimed to be anti-competitive effects which *might* occur in the future. No doubt if the evidence here had shown that there was a reasonable probability that future effects of a substantial nature would occur, sufficient would have been shown to make out this [fol. 4285] element of the case.⁴⁷ But no such showing was made. It is a far cry from *might* occur to a reasonable probability of occurring.

Reasonable probability of the lessening of competition in the future is just as much subject to evidentiary proof as is actual lessening of competition. Mere speculation or conjecture cannot be substituted for proof of reasonable probability. Nor are mere possibilities that competition might be lessened in the future, or inferences to that effect, sufficient.

In the absence of evidence of reasonable probability of anti-competitive effects the Government has speculated as to what might occur and has substituted what are at best mere possibilities for reasonable probabilities.

⁴⁷ *Brown Shoe Co. v. United States, supra*.

For example, the Government laid great stress throughout on prior acquisitions by Continental and urged that the overall history of such acquisitions impels the conclusion that the Hazel-Atlas acquisition was repugnant to the statute.

It is plain that the Act requires intervention in a cumulative process of acquisitions where the effect may be a significant reduction in the vigor of competition in any line of commerce.⁴⁸ But this cannot be assumed. It can [fol. 4286] only be established by showing that such effects had in fact occurred or that it was reasonably probable that they would. There is no such proof in this record.

The evidence as to prior acquisitions here is confined to two documents which were answers by Continental in 1946 and in 1956 to inquiries made by the Government and passing references in a letter in which Continental outlined to the Anti-Trust Division its position with respect to the proposed acquisition of Hazel-Atlas.⁴⁹ All that these documents show is that Continental has, over a period of many years, acquired a substantial number of companies, or portions of companies, in a wide variety of businesses.

Many of the acquisitions were made a number of years ago in the 1920's and the 1930's. Many were extremely small. Some were the result of liquidation sales. Some appear to have been cleared with the Department of Justice or to have had its tacit approval. Some were located in Canada. Some of the companies acquired were subsequently sold.

None of the companies acquired in the ten years prior to suit were can companies. No glass company had ever [fol. 4287] been acquired before. As I will point out a little later, the objectives of the acquisitions carried out over the last ten years at least, and of a number before that, were to diversify Continental's product lines.

The Government did not show what the effects of any of these acquisitions were, cumulative or otherwise. There was no evidence that they had any anti-competitive effects in any of the industries or product markets to which they

⁴⁸ *Brown Shoe Co. v. United States*, *supra*, pp. 318, fn. 32, 333-334, 345, fn. 72.

⁴⁹ G-785, G-786, G-900.

were related. The Government's conclusion that anti-competitive effects will necessarily flow from this merger because of Continental's prior acquisitions is pure conjecture, unsupported by evidence.

Indeed, such evidence as there is tends to negative such a conclusion. Continental's letter to the Anti-Trust Division, outlining its position with respect to the proposed acquisition,⁵⁰ states its purposes and intentions in making the acquisition.

Plainly, purpose and intention are not in any way controlling in a Section 7 case. But purpose and intention are factors which may be taken into account together with all the other factors in the case in predicting the probable [fol. 4288] future conduct of the parties and the probable effect of the merger.⁵¹ Viewed in that context purpose and intention may throw some light on the effects which might reasonably be anticipated from the merger.

The Government placed heavy reliance on Continental's letter stating the purpose of the acquisition. As expressed in that letter the purpose was a further diversification of Continental's various lines of products to include for the first time a glass container division.

The history of prior acquisitions by Continental indicates its design to diversify increasingly so as to be able to maintain independent lines of various kinds of materials used by packers of many kinds of products and to service a wider variety and number of customers. As a result of this program, apart from metal cans, other products which it had come to produce included fibre drums, kraft liner board, flexible packaging materials, plastic containers, crown caps, vacuum type metal closures, various types of can and closure machinery, paper cups and plates, and steel pails. By the acquisition of Hazel-Atlas, Continental further diversified its product lines to include glass containers and other glass products, screw and lug type [fol. 4289] metal closures and home canning closures.

There was no evidence that Continental's program of diversification resulted in the suppression of new lines which it acquired. Nor was there evidence that competi-

⁵⁰ G-900.

⁵¹ *Brown Shoe Co. v. United States*, *supra*, p. 329, fn. 48.

tion in these lines was curtailed or that any pressures, either directly or indirectly, were brought in any of them which tended to create any anti-competitive effects. Though the case was tried almost four years after the acquisition, far from indicating that there had been any such post-acquisition effects, the evidence was to the contrary. This is especially significant in the case of a conglomerate merger such as this.⁶²

The announced, and, indeed, actual policy which Continental followed was to encourage development of the new lines in separate corporate divisions and to promote intra-company competition so as to strengthen its overall ability to compete with other companies in the different industries and different product lines in which it was doing business.

There are no indications in the record that the acquisition tended either to weaken the position of Hazel-Atlas as a competitive factor in the glass industry or in any of its product lines, or to weaken Continental's position as [fol. 4290] a competitive factor in the metal can industry or in its product lines. Nor is there anything to show that such positions were so strengthened as to have any significant anti-competitive effects in any of the industries or markets involved here.

In the light of the situation in the metal can and glass container industries, the apprehension expressed by the Government that Continental was likely to eliminate or limit the manufacture of glass containers after the Hazel-Atlas acquisition or to eliminate or limit some of its can lines, is not only unsupported by the evidence but also unfounded. In fact any such course would have run counter to Continental's concept of the theory and purpose of its diversification program.

The Government views with alarm every advantage which Continental or Hazel-Atlas might gain as a result of the merger and sees in each the spectre of anti-competitive effects. But the mere fact that the competitive position of acquiring or acquired companies may be improved by a

⁶² Procter & Gamble Co., *supra*, p. 20,258.

merger does not establish that the merger is harmful or has any of the proscribed anti-competitive effects.⁵³

[fol. 4291] The test is not whether, as a result of a merger, either the acquired or acquiring company obtains advantages which help it to compete more effectively. Obviously were this so, any merger permitted under the Act could have no sound business justification. The object of the Clayton Act is not to discourage business from taking steps to compete more effectively but to keep competition vigorous and effective. Opportunities to offer improved products, to make cost reductions or to give better service to customers are not in themselves indications of anti-competitive effects. These are all legitimate business objectives. "It may well be that by effecting a better arrangement for a more profitable undertaking . . . competition would be stimulated rather than lessened."⁵⁴

Thus, the Government could not have succeeded here merely by showing that there were competitive advantages accruing to the acquiring or acquired companies or both from the merger. It is the *anti-competitive* effects of the merger with which the statute is concerned—that is to say, the lessening of the vigor of competition, rather than the converse. Competitive advantages are not proscribed unless there is a reasonable probability that anti-competitive [fol. 4292] effects of some significance in the relevant product markets will result. No such showing was made.

The Government also contended that "concentration" in the industries and product markets involved resulted from the merger which should be considered as a key factor in establishing that there was reasonable probability of anti-competitive effects or tendency to monopoly.

Concededly Continental was a very large corporate entity. So to a much lesser degree was Hazel-Atlas. They stood second and third respectively in their industries and each had substantial shares in different product markets.

⁵³ *Brown Shoe Co. v. United States*, *supra*, pp. 319-320. See also Address by Attorney General Robert F. Kennedy, Economic Club of New York, Nov. 13, 1961.

⁵⁴ 96 Cong. Rec. 16,456 (1950) (Remarks of Senator O'Connor.)

It is not to be doubted that size and market shares are factors to be taken into account in determining anti-competitive effects and tendency to monopolize. But mere size or concentration alone are not decisive. As the Supreme Court has said, exclusively mathematical tests are to be avoided.⁵⁵

Such tests are particularly inapposite where a conglomerate merger is under scrutiny. In such a situation the Supreme Court's stricture that the merger must be "functionally viewed, in the context of its particular industry"⁵⁶ [fol. 4293] becomes especially meaningful.

A conglomerate merger does not result in the elimination of a competitor but merely substitutes the competition of the acquiring company for that of the acquired company in the lines of commerce in which the acquired company was formerly engaged. Thus, such a merger does not in itself result in any increase in industry or product market concentration and the shares of the acquiring and acquired companies in their respective product markets are the same as they were before.

Of course, if the product markets served by the acquiring and acquired companies are closely tied together, it is possible that substantial competitive advantages may accrue which could result in changes of market positions. It was not shown that this was the situation here, however, and though, at the time of trial three and a half years had elapsed since the merger, there was no indication either that any such changes had occurred or were reasonably likely to occur.

The record here is replete with statistics. Basic figures have been combined, separated, recombined and then combined again. Many of these combinations have no sound statistical basis and are predicated on implausible hypotheses [fol. 4294] not supported by evidence. Figures have been placed in unnatural and illogical groupings without re-

⁵⁵ Brown Shoe Co. v. United States, *supra*, p. 321, fn. 36. See also A. G. Spalding & Bros., Inc. v. Federal Trade Commission, *supra*, pp. 625-626; Crown Zellerbach Corporation v. Federal Trade Commission, *supra*, p. 826.

⁵⁶ Brown Shoe Co. v. United States, *supra*, pp. 321-322.

garit to dissimilarity of products, separate and distinct industrial patterns or the realities of the marketplace. This was particularly evident in the proof concerning the last five lines of commerce where the Government unsuccessfully attempted to combine different products produced by different industries solely in terms of end uses.⁵⁷

The 78 witnesses placed on the stand by the Government included, in addition to one can manufacturer, 18 representatives of glass container manufacturers, several plastic container manufacturers, three minor food packers, and a number of firms manufacturing toiletries, cosmetics and drugs.

Yet the Government failed to adduce testimony from these witnesses from which inferences or conclusions could be reasonably drawn that there was reasonable probability of anti-competitive effects or monopolistic tendencies. These witnesses, instead, gave a picture of keen and vigorous competition within the industries and markets with [fol. 4295] which they were respectively familiar and between such industries and markets and the other industries and markets involved, both before and after the acquisition. None of them gave evidence tending to show either that the merger had in fact lessened competition in any line of commerce or that there was any reasonable probability of its doing so.

Viewing the evidence as a whole, quite apart from theory, there was a total failure by the Government to establish the essential elements of a violation of Section 7. As will be apparent from a discussion of the proof relating to each specific line of commerce, the Government did not lay either the statistical or testimonial foundations required to establish its case. It was this failure of proof which required the dismissal of the complaint and entry of judgment for the defendants.

⁵⁷ These lines of commerce are containers for the soft drink industry, pp. 95-102, *infra*, the canning industry, pp. 103-112, *infra*, and the toiletries and cosmetic industry, the medicine and health industry, and the household and chemical industry, pp. 112-122, *infra*.

VI

The proof as to the lines of commerce specified by the Government⁵⁸

(1) "The packaging industry."

The claim of the Government as to this line of commerce [fol. 4296] was dismissed during the oral argument of defendants' motion made at the close of the Government's case.

The evidence in the record on which the Government relied to establish what it called "the packaging industry" product market was confined to the mid-1956 letter from Continental answering Department of Justice inquiries concerning its proposed acquisition of Hazel-Atlas.⁵⁹ In that letter Continental outlined its diversification program and stated it was attempting to provide "tailor-made packaging" for a wide variety of products. In discussing this program the letter used the generic but undefined term "the packaging industry."

As requested, the letter estimated the percentage of the national market held by Continental in various groups of products for the year 1955. The products listed included: metal cans, steel pails, lithographed kitchenware made of tin plate, unspecified military items, can closing equipment, metal closures, cork products, low pressure laminates, injection molding, rigid plastic containers, squeeze bottles, plastic pipe and fittings, paperboard, paper products (including paper cups and plates, nested containers and fibre drums) and flexible packaging.

[fol. 4297] The estimates made by Continental of its share of the markets in these various products ranged from less than 2% in such product categories as paper board and injection moldings, to 31.4% in metal cans, and in the single instance of fibre drums, to approximately 80%. With respect to several products no figures were available from

⁵⁸ The lines of commerce will be discussed in the order in which they are listed at page 41, *supra*.

⁵⁹ G-900. See *supra*, p. 58.

which any informed estimates could be made and some of the products listed, such as plastic pipe, were no longer produced by Continental.

In addition to these product categories the Government apparently also sought to include within this line of commerce corrugated shipping cartons and other products manufactured by Gair, and glass containers, glassware, screw type metal closures and closures for home canning jars produced by Hazel-Atlas.

There was no definition of the boundaries of this alleged line of commerce in the record. Nor were there any universe figures for it. The Government offered in evidence a table purporting to compare the value of all packaging materials sold in 1957 and 1958 with the net sales and operating revenues of Continental for these years.⁶⁰ The table was excluded because there was no substantiation [fol. 4298] whatsoever of the overall figures which it contained. The comparisons which the table attempted to make between Continental's sales and revenues and the value of all packaging materials sold were shown to be utterly unsound statistically and entirely unsupportable. During the colloquy concerning the admission of this exhibit, it became apparent that the Government conceived of "the packaging industry" as involving a sales volume of more than ten billion dollars. The products which it sought to include fell into 43 general categories, each of which was sub-dividable into countless individual items. The products ranged from cooperage to grocery boxes, from transparent film to steel drums, from pill boxes to plastic and glass carboys, from fruit and vegetable baskets to plastic tubes and from Christmas wrappings to cigar boxes. Here we are veritably wandering in a sort of Clayton Act Wonderland where there is talk "of shoes—and ships—and sealing wax—of cabbages—and kings . . ."⁶¹

It is manifest that the broadest application of the product market test of "reasonable interchangeability of use or

⁶⁰ G-803(5c) for id.

⁶¹ Lewis Carroll (Charles Lutwidge Dodgson), *Through the Looking-Glass and What Alice Found There*, Chap. IV, Stanza 11.

cross-elasticity of demand" could not possibly encompass this wide diversity of products and there was no evidence [fol. 4299] that it did. Nor was there any evidence concerning industry or public recognition of the market, peculiar characteristics and uses of the products involved, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, specialized vendors, or any of the other practical indicia by which a product market may be determined.⁶²

Moreover, the record does not even show the names of the companies which were claimed to be a part of the industry, to say nothing of where they were located, what their annual sales were, or anything about them. There is nothing at all in this record from which it could be found that a relevant "packaging industry" product market exists.

Furthermore, there was no evidence at all about competition within this alleged market, let alone anti-competitive effects. In sum, there was complete failure of proof.

(2) "The metal can industry."

The defendants conceded that this line of commerce, as delineated by the Government, was a separate and relevant product market, and I have so found. Thus, the Government's burden was confined to establishing that, in this [fol. 4300] product market, there was reasonable probability of substantial anti-competitive effects resulting from the acquisition.

The Government claims that in this line-of-commerce, as a result of the acquisition:

(a) Continental's increase in size and diversity, and its consequent ability to offer a full line of container products, gave it an advantage over smaller and less diversified can manufacturers which threatened to be decisive.

(b) Entry into the industry was made more difficult and more unlikely than prior to the merger, and the possibility of new entry was significantly decreased.

(c) It was probable that similar mergers would be trig-

⁶² See discussion *supra*, pp. 10-11.

gered and that such further acquisitions would make effective competition less likely.

(d) Continental's incentive to push metal cans as against glass or plastic containers was reduced, and it was therefore less likely to be an industry innovator and pioneer.

(e) And finally, there was a tendency toward monopoly because the merger tended "to aggravate a general oligopolistic trend" in the industry.

[fol. 4301] We are dealing here with the effects of the merger in a specific line of commerce—the metal can industry. Unless the probability of substantial anti-competitive effects were shown in that industry, the Government case as to this line of commerce necessarily failed.

The Government's difficulty here was the same that it encountered so frequently in this trial. Its claims are pure speculation and as far as I can discern, are not supported by any proof that it was reasonably probable that the claimed results would follow.

a. The Government urged that Continental obtained an advantage over its competitors in this industry which threatened to become decisive because of its ability after the merger to offer a "full line" of metal, glass and plastic containers, closures of various types and closure machinery. But there was no testimony that a can manufacturer obtained any particular competitive advantage by offering a full line of container products.

The only can manufacturer who testified was the Chairman of the Board of National Can, the No. 3 company in the industry, which manufactured general line and packers' cans only. His testimony was to the effect that National was expanding its operations; that it had built a new plant as late as 1956; that competition in the industry was "tougher"; but that National's earnings figures had gone down somewhat since 1956 though to what extent was not shown. He did not testify that there was any competitive advantage to be obtained in the can industry from offering a full line of products. Nor did he indicate that whatever decline in earnings National had had since 1956 was in any way ascribable to the Hazel-Atlas-Continental merger.

No other can manufacturer was called to testify. No one else testified on this subject. There were no documents or figures in the record supporting the Government's contention.

Plainly, Continental, by its diversification program, expected to be able to compete more effectively against the strong competition in this highly competitive market.⁶³ But on this record it would be sheer speculation to conclude that because this was so, anti-competitive effects were likely to occur, to say nothing of competitive advantages which threatened to become decisive. There was no evidence of any such probabilities.

b. Much the same can be said of the Government's contention that the acquisition made new entry into the industry more difficult and significantly reduced the possibility [fol. 4303] of such entry. The only evidence which might be considered to bear any relation to this contention is the testimony of the National Can Board Chairman that there had been no new company among the six top producers since 1935, and that of the Board Chairman of Owens-Illinois Glass concerning the metal can business which that company carried on between 1936 and 1944.

The National Can Chairman did not testify that there was undue difficulty in entering the metal can industry at any time. This can scarcely be inferred from the fact that competition in the industry was keen and vigorous and becoming increasingly so. It is of course always difficult to enter a highly competitive industry. But the Clayton Act was surely not designed to make an industry less competitive as to encourage new entrants. It was designed to insure that competition remained keen and vigorous.

As to the Owens-Illinois experience, it appeared that this company acquired various metal can companies in 1936, made a profit from its can business immediately before the war and disposed of the business in 1944 when, because of the war, it was difficult to get the necessary supply of tin plate. It then sold its can business to Continental for \$7,500,000. Continental did not acquire any other metal

⁶³ See discussion *supra*, p.

[fol. 4304] can company in the ensuing sixteen years up to the time of the trial.

There was no other evidence in the record bearing on this contention. There was no showing that the amount of capital required to enter the industry was unreasonably large, that any unobtainable know-how was required, that there were any patent barriers to entry, or that any other factors made entry difficult for anyone desiring to go into the business. Indeed, there was no evidence at all concerning problems of entry at the time of the merger or subsequently.

Once again the Government's claim was based on sheer speculation unsupported by proof.

c. There was no showing that this acquisition would trigger further acquisitions of glass companies by can companies. To sustain this contention the Government seized on a passing mention by the Executive Director of the Glass Container Manufacturers Institute that he had heard a rumor to the effect that a relationship had recently been established between American Can and Wheaton Glass Company. The subject was dropped there and never referred to in the evidence again. The Government made no effort to call either American Can or Wheaton to find out anything about this. There was nothing to show the nature of the arrangement, the reasons for it, what it was all about, [fol. 4305] or indeed that it in fact existed. Nor was there anything to show that if it did exist it had any connection with or bore any relation to the Continental-Hazel-Atlas merger.

d. The Government fared no better on its claim that as a result of the merger Continental was likely to lose the incentive to push can sales at the expense of glass. The Government introduced no evidence showing either that there had been or was likely to be any slackening of effort to push can sales. On the contrary, as has been pointed out, the object of the merger was diversification, and Continental was actively promoting intra-company competition between its various product lines.⁶⁴ Since by far the largest propor-

⁶⁴ *Supra*, pp. 58-61.

tion of Continental's business was in metal cans, it scarcely seemed likely that cans would suffer at the expense of glass.

Moreover, subsequent to the merger Continental actively engaged in a vigorous research and promotion program in both its metal and glass container lines. In the light of the record and of the competitive realities, the notion that it was likely to cease being an innovator in either line is patently absurd.

e. Finally, the Government's claim that the acquisition [fol. 4306] would tend toward monopoly in the can industry rests on no firmer footing than the other claims just discussed. What the Government said it meant by this claim was that the merger would "tend to aggravate a general oligopolistic trend in an industry."

As far as I can discern, what the Government relied on in terms of specifics was that Continental had widely diversified its product lines by acquiring other companies engaged in different businesses and now has assets and sales in excess of one billion dollars.

The Government placed in the record figures purporting to show the share of Continental in the combined metal can and glass container industries based on alleged total unit production. At best these figures rest on a somewhat shaky statistical foundation. But even accepting them at face value, Continental's share of the combined industries in 1957 was less than 25% and it remained in second place behind American Can which does not produce glass containers. The competition in both industries has consistently been keen and vigorous. There are many strong competing companies in both industries and there was no evidence of any diminution of competition. No reasonable probability that the merger will tend to create a monopoly was shown or could reasonably be inferred.

[fol. 4307] (3) "The glass container industry."

This line of commerce, as delineated by the Government, was also conceded by defendants to be a separate and distinct product market and I have found that it was. Here, too, the Government's only obligation was to establish reasonable probability of substantial anti-competitive effects in a recognized product market.

Its claims were in large measure the same as those it made with respect to the metal can industry. It contended that the increased size and diversity of Continental after the merger, and its ability to offer a full line of container products gave it a competitive advantage in the glass container industry that threatened to become decisive; that entry into the industry had been made more difficult by the merger; that the acquisition would trigger self-defensive similar acquisitions; that there was less incentive for Continental to push glass at the expense of cans or plastics; and that there was a tendency toward monopoly in the industry.

All of these contentions failed for lack of evidence to support them. Little needs to be added here to what has been already said under the metal can line. Only additional features specifically bearing on the glass container industry will be discussed.

The evidence on which the Government relied to establish [fol. 4308] the likelihood of increased difficulty of entry into the industry as a result of the acquisition is illustrative of how flimsy its proof was on much of this case. The major emphasis was placed on a letter from Emhart Manufacturing Company, a producer of glass forming machinery, to the AntiTrust Division in 1958.⁶⁵ The Government urged that a paragraph of the letter headed "Glass Container Business Requirements" stated the factors showing difficulty of entry into this field. A reading of the paragraph on which the Government relies is illuminating:

"It is Emhart's opinion based on its experience that an essential requirement in entering the glass business is to obtain the services of at least one good man of executive or managerial caliber, experienced in the art of manufacturing glassware. A great deal of know-how is required, but the glass technology and engineering services of Emhart and others specializing in this industry are available. Machine operators are usually obtained from the unions. A large amount of capital is required. A real problem exists in finding a market

for new production in competition with established manufacturers."

It is difficult to understand the claim that this paragraph supports the Government's position. The paragraph certainly does not show that entry into the glass container industry is any more difficult than would normally be expected in a well established highly competitive industry. The only indication as to what the statement "a large amount of capital is required" means is a proposal which Emhart made to Gallo Wine Company in 1956 with reference to the establishment, from the ground up, of a plant to meet Gallo's substantial wine bottle requirements. Emhart estimated the cost as slightly more than three million dollars, surely not an unreasonably large capital requirement for the institution of such an enterprise.

The Government's reliance on the failure of the Neville Island Glass Company in 1947, to show difficulty of entry in 1956, is just as far removed from reality.

This small company never got off the ground and lasted less than a year before it went into a Chapter X reorganization and was thereafter liquidated. As appears from the Section 167 report of its Trustee in Reorganization, "the company was doomed from its inception due to egregious under-capitalization, inadequate facilities, and incompetent management. Its failure, occurring nine years before the merger and thirteen years before the trial, proves precisely nothing.

As against this evidence, or lack of it, it appears that five new companies using Emhart machinery, and six other new companies, have in fact entered the glass container [fol. 4310] field since 1950, some independent and some captive. In addition, new production facilities have been placed in operation throughout the industry at a rapid rate, the growth and expansion of the industry have been rapid, and competition has consistently been keen and vigorous.

The Government also urged that Hazel-Atlas obtained competitive advantages in the glass container industry which threatened to become decisive because the Gair Division of Continental manufactured corrugated shipping

⁶⁶ Defendants' Exh. J.

cartons in which glass containers are usually shipped. This is the one instance in this case where the Government contended that there was an aspect to the merger of a vertical nature since the shipping carton represents a not insignificant part of the cost of the glass container as shipped. But here again the proof failed to support the theory.

Owens-Illinois and Anchor-Hocking, among other major glass container companies, produced corrugated shipping containers for their own use. Other companies used local suppliers in the vicinity of their plants, generally more than one local supplier. Yet others, such as Ball Bros., both manufactured such containers themselves and brought locally.

Corrugated shipping containers are readily available in any quantities required. There was nothing in the record [fol. 4311] to show that Hazel-Atlas, which before the merger was third in the industry and did not manufacture cartons, or any other company which did not do so, was under the slightest competitive disadvantage against manufacturers who made their own. Nor was there any evidence that any significant competitive advantage was to be gained by producing cartons, much less a decisive advantage.

The Government's next contention was that significant competitive advantages in the glass container industry were likely to accrue to Continental as a result of the acquisition because it produced crown caps which were used to close glass beer and beverage bottles, vacuum type closures used to seal hermetically glass jars, and vacuum closure machinery. Once more the evidence failed to support the Government's theory.

There was nothing at all about any competitive advantages to be derived by a manufacturer who produced both glass bottles and crown caps. As I shall point out a little later, Hazel-Atlas did not manufacture beer or beverage bottles or any other narrow neck bottles on which crown caps are used, to any significant extent, nor was there any likelihood of its doing so.⁶⁷ On the other hand, Anchor [fol. 4312] Hocking and Owens-Illinois were large manu-

⁶⁷ See pp. 90-91, 99-100, *infra*.

facturers of beer and beverage bottles. They did not manufacture crown caps. Their consistent positions in the industry make it manifest that they suffer no disadvantage from that fact. Plainly the crown cap contention has no merit.

As to vacuum closures and vacuum closure machinery—of the eighteen representatives of glass manufacturers who testified, seventeen did not refer to the subject of such advantages at all. The only glass manufacturer who mentioned it, the Vice-President of Brockway, indicated that there might be a sales advantage in selling both vacuum closures and glass containers. He said, however, that there was no reason why his company could not manufacture vacuum closures if it wished but that it had never chosen to do so. Significantly enough, according to his testimony, the sales of Brockway had risen from twenty-three million dollars in 1954 to fifty-one million dollars in 1959. It can scarcely be said that Brockway was significantly disadvantaged.

Owens-Illinois and Anchor-Hocking also make vacuum closures and machines for applying them. There was no evidence that any competitive advantages over other glass container manufacturers accrued to them because they did so.

The theory was also somewhat tentatively advanced by the Government that the Hazel-Atlas Division of Continental [fol. 4313] would have a significant competitive advantage in the glass industry by having access to the confidential customer lists of Continental. The Government offered no proof whatsoever to sustain this theory and it was without support in the record.

In addition the Government advanced the converse of the proposition which it urged with respect to the metal can line—that as a result of the merger Continental was likely to lose the incentive to push glass container sales at the expense of cans. In view of what has been said concerning the purpose of Continental's diversification program and the course it pursued after the merger, it is no more likely that Continental would slacken its efforts to promote glass than that it would slacken its efforts to promote cans. Indeed, if it had planned to do so there would have been lit-

tle, if any, point to acquiring Hazel-Atlas, a major glass container producer.

Whether the Government's claims as to the effects of the acquisition in the glass container industry be considered separately or in combination, it showed no reasonable probability of substantial anti-competitive effects or tendency to monopoly in this industry as a result of the acquisition.

[fol. 4314]

(4) "*Metal closures.*"

There are several types of closures used to close or seal containers, as I have already mentioned. They are made of a variety of materials, including tin plate, aluminum, plastic and paper.

The Government excluded from its "metal closure" line of commerce closures made of aluminum, plastic and paper and there were no statistics with respect to such closures in the record. It also excluded crown caps and home canning closures, both made of metal (tin plate). Thus the line of commerce which the Government defined as "metal closures" included only two types of metal closures—vacuum type closures and screw and lug type closures. The former were produced by Continental in its recently acquired White Cap Division but not by Hazel-Atlas, and the latter were made by Hazel-Atlas but not by Continental.

The proof offered by the Government failed to establish that vacuum type closures and screw and lug type closures can properly be combined into a single product market. In fact the evidence was to the contrary.

There was no public or industry recognition that such a product market existed. There was no showing of interchangeability of use, cross-elasticity of demand or cross-sensitivity of prices between the two distinct types of product [fol. 4315] yet which the Government sought to bracket together. There were no distinct classes of customers or any specialized vendors for both products. Production facilities for the two were quite different.

These products do not have the same characteristics or end uses. Vacuum closures, whether of the side-seal, top-seal or roll-on variety, are used almost exclusively for heat sterilized food products packed in glass containers where a vacuum is required to prevent spoilage. Screw type clos-

ures of metal and plastic, on the other hand, are used both for foods and non-foods. There was no showing that screw type closures were used on foods which require vacuum packing, and, as far as appears here, they are generally used to pack different food products from those which require vacuum closures and for non-food products as well.

Vacuum closures are applied by machine. A number of companies which produced vacuum closures, including Continental (White Cap), Owens-Illinois and Anchor-Hocking, also produced and sold or leased machinery for applying them. The closure machinery made by one company can be used to apply vacuum closures made by other companies, in some cases with and in some cases without minor modifications.

However, machines which apply vacuum closures cannot be used to apply screw type closures. They operate differ- [fol. 4316] ently and much more speedily than screw type closure machines.

These two types of closures do not compete with one another to any significant degree, if at all. Each is in a quite distinct and separate line of commerce and I so find. Indeed, it appears that the Government has abandoned its contention that this combination of products constitutes a separate line of commerce by failing to request a finding to that effect.

In view of the failure to establish this as a line of commerce it is unnecessary to discuss anti-competitive effects of the acquisition within it, though, in any event, proof of such effects was wholly lacking.

(5) *Containers for the beer industry.*

This is the first of the lines of commerce which the Government sought to define in terms of end use. It is composed of metal cans and glass bottles sold to brewers and used to package beer.

The proof indicates the following:

Beer can only be packaged in metal cans or glass bottles. The cans and bottles used to package beer are suitable only for that purpose.

Beer generates specific pressures which are peculiar to it.

[fol. 4317] Beer cans and bottles are therefore structurally designed to resist such pressures and are not suitable for liquids such as carbonated beverages which generate different pressures. Beer cans and bottles are made in the same sizes in terms of capacity. Cans used for beer have special linings. Because of the characteristics of glass, beer bottles need not be lined. Thus, beer cans and beer bottles not only have the same end uses but have some common characteristics.

Brewers constitute a distinct and limited class of customer for both and they are sold to no other customers. Either one or the other may be used by the brewer as he chooses.

The trade associations of both the metal can and glass container industries have made extensive studies of the competition between beer cans and beer bottles and the inroads which they have respectively made on one another. Individual manufacturers, including Continental, have made similar studies. Each industry and the individual manufacturers in each were actively engaged in promoting the sale of one container as against the other.

Individual manufacturers of beer containers in each industry are sensitive to competition from the other. There was recognition in each industry of virtual interchangeability of use and cross-elasticity of demand between the two types of containers used for this purpose.

[fol. 4318] Manufacturers of beer cans and beer bottles showed considerable interest in the prices charged for the competing container and it is a fair inference that there was some price relationship between the two.

Of course, in view of the fact that defendants' motion to dismiss was granted at the close of the Government's case only one side of the picture was presented. At that stage of the case, however, the proof adduced by the Government, standing as it did uncontradicted, established *prima facie* that this was a relevant product market.

The basis on which the defendants' motion to dismiss as to this line of commerce was granted was not therefore the Government's failure to establish the relevant product market but rather its failure to establish the reasonable probability of substantial lessening of competition or tend-

ency to monopoly in the market as a result of the Hazel-Atlas acquisition.

The statistics on which the Government relied to show the scope and extent of this product market were based on unit sales of cans and bottles.⁶⁸ These figures are of questionable accuracy with respect to beer can units because of [fol. 4319] the method of computation used,⁶⁹ and with respect to beer bottle units because no weight was given to the fact that most beer bottles are returnable and are refilled an average of twenty-two times by the brewer.

Nevertheless, the figures in the record were an indication of the overall size of the market. According to these figures shipments of beer cans and bottles exceeded 8.8 billion units in 1955, 9.3 billion in 1956, and 9.6 billion in 1957. This was plainly a large product market.

Although at one time almost all packaged beer was sold in bottles, in a relatively short period the beer can made great headway and may well have become the dominant beer container. Beer cans represented approximately 83% of the total in 1955 and approximately 83.7% in 1957, though, as has been noted, the failure to give weight to the returnable bottle factor distorts these figures.

[fol. 4320] Continental's share of the beer can market, measured by units shipped, ran from 43% in 1955 to 46% in 1957. Its share of both beer can and beer bottle shipments, disregarding the returnable bottle factor, ran from 36% in 1955 to 38% in 1957. It is apparent that Continental had a sizeable share of the total product market.

The participation of Hazel-Atlas in the product market is in sharp contrast. Before the merger in 1955 Hazel-Atlas shipped only 8/10ths of one percent of the total beer bottles

⁶⁸ G-801(1d), (2d), (3d).

⁶⁹ The unit figures are arrived at by converting base boxes of tin plate to short tons of steel and then applying a conversion figure to the tonnage to arrive at a unit figure. The conversion figure is based upon a hypothetical number of beer cans which might have been produced from each short ton of steel consumed. Although the formula used is related to methods used by the Bureau of Census, the reliability of the outcome was not demonstrated.

shipped, disregarding the returnable bottle factor. It shipped only 2/10ths of one percent of returnable beer bottles. In 1957, over a year after the merger, its total beer bottle shipments, again disregarding the returnable bottle factor, had barely advanced to 1.1% of the total beer bottles shipped.⁷⁰ There were no figures as to its shipments of returnable bottles in 1957.

These figures show only the extent of the Hazel-Atlas participation in beer bottles and not in the market composed of beer cans and beer bottles together. Its share in this overall market was only 14/100ths of one percent in 1955 and 17/100ths of one percent in 1957. The Hazel-Atlas share of the beer container product market was completely [fol. 4321] insignificant and indeed practically non-existent.

At the time of the merger for all practical purposes Hazel-Atlas was not a competitive factor in this product market, nor had it ever been. The acquisition of Hazel-Atlas by Continental could not have lessened existing competition in the market to any remotely significant degree and there is no evidence that it did. Nor was Continental's position in the market strengthened to any significant degree by the acquisition. It remained in second place behind American Can and its role in the market was not appreciably affected.

The Government did not stress the claim that there was any actual lessening of existing competition in this line of commerce as a result of the merger. It contended, instead, that there might be anti-competitive effects in the future because the potential of Hazel-Atlas as a competitor in the manufacture of beer bottles had been eliminated. The difficulty with this position was that the evidence failed to show that, had the acquisition not taken place, there was any reasonable probability that Hazel-Atlas would become a significant competitive factor in the manufacture of beer bottles.

At the time of the acquisition Hazel-Atlas was primarily a manufacturer of wide mouth containers which could not [fol. 4322] be used for beer and had relatively few machines for the manufacture of narrow neck bottles. It did not

⁷⁰ G-801(1d), G-800I.

make amber glass, required for most beer bottles, in any quantity. It was not able to produce beer bottles economically. Though it filled an occasional order it did not consider itself to be a manufacturer of beer bottles.

There was evidence that some of its wide mouth manufacturing machinery could have been converted to narrow neck manufacture at relatively little expense and that it would have been able to convert its flint glass tanks to the manufacture of amber glass had it desired to do so. But the record is devoid of evidence that it had any intentoin of so doing, or any reason for such a step which could have been taken only at the expense of its regular product lines.

Hazel-Atlas had no surplus capacity and its production was fully occupied with supplying its customers in the glass lines in which it had significant sales. Its plans to build a new plant in Plainfield, Illinois, had been deferred due to heavy increase in the costs involved. There was no intention, in any event, of using the proposed plant for the manufacture of beer bottles or of converting any of its existing facilities to such use. The Plainfield plant was planned for the purpose of producing the regular Hazel-Atlas product [fol. 4323] lines in the general Chicago area so as to bring it closer to that market and reduce freight costs.

Such scraps of evidence as there are concerning Hazel-Atlas's miniscule manufacture of beer bottles do not indicate that there was any likelihood of its becoming a significant competitor in the beer bottle field. There was a rumor that Hazel-Atlas was selling a few beer bottles on the West Coast in 1956 but there were also indications to the contrary. Two Hazel-Atlas salesmen in 1953, when it manufactured no beer bottles at all, referred to Owens-Illinois beer bottle prices in two unsolicited letters to the company. A Hazel-Atlas officer, in a speech made in 1954, made brief reference to limited experiments in amber glass. That is all there was on this subject. It was plainly not enough.

Of course, there was always the *possibility* that Hazel-Atlas might, at some undetermined time in the future, for some undetermined reason, have undertaken to become a significant manufacturer of beer bottles. That, however,

was mere speculation and by no means met the reasonable probability test.

There was no evidence in the record of any reasonable probability that the effect of the acquisition would be substantially to lessen competition or to tend toward monopoly [fol. 4324] in the beer container market.

(6) "Containers for the soft drink industry."

The Government attempted to define this line of commerce, in terms of end use, as comprising metal cans and glass bottles used to package "soft drinks." However, it is difficult to understand just what the Government intended the term "soft drinks" to mean.

The statistics produced to support this line of commerce are confusing. The table as to shipments of glass containers included in this line of commerce was headed "Beverage containers, returnable and non-returnable."⁷¹ The table for metal can shipments included in the line was headed "Soft Drink Containers."⁷²

"Beverages" apparently included bottled water, a variety of fruit juices and other unspecified drinks. One Government statistician, testifying on these tables, said that they included "mostly soft drinks" but that bottled water in carboys was also included. On the other hand, a [fol. 4325] food technician called by the Government testified that he considered soft drinks to be in the food category. Some fruit juice containers were classified as food containers, and orange drink in wide mouthed glass jars was classified under the heading "Dairy Products."

The Government's statistics were taken from Census Bureau figures, which in turn were derived from figures supplied by the Glass Container Manufacturers Institute. The Institute classified "beverages" as applying "to all bottles for soft drinks and water, carbonated or non-

⁷¹ G-801(1e).

⁷² G-801(2e). These statistics are predicated on the same theoretical computations as were used for beer cans—that is to say, unit base boxes of steel converted into short tons of steel, converted in turn into can units.

carbonated” But this does not aid materially in resolving the confusion.⁷³

There appeared to be no definition in the record of the term “soft drinks” as used in the metal can table but I will assume, for purposes of this discussion, that it includes at least carbonated and non-carbonated beverages.⁷⁴ [fol. 4326] The figures for glass and metal containers were combined in a third table purporting to show total container shipments of “glass and metal soft drink and beverage containers.”⁷⁵ This is the table on which the Government relied to establish this line of commerce.

Assuming the line includes both carbonated and non-carbonated beverages, and perhaps other products, there is no evidence to establish that this is a separate and distinct product market.

The boundaries of the market were undefined and there was no showing of interchangeability of use or cross-elasticity of demand between the various types of containers

⁷³ For example, G-1205 gives the following instructions for reporting to the Institute production of containers for dairy products?

“This classification applies to all containers used by dairies. It includes milk and cream bottles, and it also includes cottage cheese jars, *orange and chocolate drinks when not in narrow neck beverage bottles.*” (Emphasis added.)

I assume that orange and chocolate drinks, when in narrow neck bottles are classified under beverages and, therefore, come under “soft drinks.” But to confuse matters further, fruit juices, when in narrow neck bottles are included under containers for foods.

⁷⁴ There is no evidence to indicate whether or not G-802, Table 2c, the Government’s table on metal soft drink containers lumps metal containers for both carbonated and non-carbonated beverages together, but in order for these figures to be at all relevant on this line of commerce they must be consistent with those used for glass containers and with the term “soft drinks” as used by the Government.

⁷⁵ G-801(3e).

included. In fact, carbonated beverages generate even more pressure than beer, and bottles and cans used for those purposes must be specially designed to withstand such pressures. They have different physical characteristics from bottles and cans used for other soft drinks.

The practical indicia to be examined did not show that a product market consisting of carbonated and non-carbonated beverages and soft drinks exists and I have found that no such market was established.

However, after the case was concluded there were indications [fol. 4327] that the Government's position changed and that it then sought to have this line of commerce confined to carbonated beverages only. If this be so, the Government shifted its position with respect to this line at a very late date indeed. But assuming this change in position to be permissible, the Government is faced with the difficulty that no record was made to support its altered theory.

There were no universe or total unit figures and no breakdown figures in the record showing shipments of carbonated beverage containers, taken by themselves, as distinguished from soft drink and beverage containers generally. In the absence of such figures it is manifestly impossible to determine the extent of such a market or the shares of Continental, Hazel-Atlas and other manufacturers in it.

But quite apart from the failure of the Government to establish a carbonated beverage product market consisting of metal cans and glass bottles, it failed to show any anti-competitive effects of the merger in such a market, if it existed.

After considerable initial difficulty, metal can manufacturers developed a can strong enough to resist the pressures generated by carbonated beverages. These cans had advantages which distinguished them from glass bottles, including [fol. 4328] unbreakability, greater lightness in weight, lack of necessity for return, faster chilling and less storage space requirements. However, the cost as compared with the bottle, and particularly the returnable bottle, was and continued to be high. The metal can for carbonated beverages was conceived of as a luxury package to be sold at a premium price with a resulting increase

in the overall sale of carbonated beverages rather than a decreased use of bottles by beverage manufacturers.

However, can manufacturers made strenuous efforts to promote the use of metal cans for carbonated beverages as against glass bottles. Despite these efforts, taking into account the estimate that returnable beverage bottles are reused twenty-five times, not more than $1\frac{1}{2}\%$ of all soft drinks sold were packaged in metal cans and the cans used for this purpose constituted less than 1% of overall can production.

Continental's share of this small market for metal soft drink containers ranged from 36% in 1955 to 26% in 1957.

Disregarding the important returnable bottle factor, the Hazel-Atlas percentage of total shipments of glass beverage containers was only 0.04% in 1955, 0.08% in 1956 and 0.6% in 1957.⁷⁶ It would, of course, be very much smaller were [fol. 4329] weight given to the returnable factor. In 1955 Hazel-Atlas shipped no returnable beverage bottles. The Hazel-Atlas share of total glass and metal soft drink and beverage containers shipped, once again disregarding the returnable bottle factor, was 0.03% in 1955, 0.07% in 1956 and 0.48% in 1957.

Thus, as in the case of beer containers, the Hazel-Atlas share of the product market consisting of metal and glass containers for soft drinks and beverages was so insignificant as to be for all practical purposes non-existent. Indeed, in 1955, prior to the acquisition it was only 3/100ths of one percent, even less than in the case of beer. Were any figures for carbonated drinks alone available in the record it cannot be assumed that Hazel-Atlas's percentage of this market would be any more significant.

Moreover, Continental's share in the total market was far from large, even with the returnable bottle factor disregarded. If that factor be disregarded, its share of the total shipments of glass and metal soft drink and beverage containers was 7.2% in 1955, less than 5.4% in 1956, and

⁷⁶ The percentage figures for 1955-1956 shown as 0.1% for each year in G-801 are incorrect. I have used the correct figures.

less than 6.2% in 1957.⁷⁷ Taking the returnable factor into [fol. 4330] account, however, as previously indicated, Continental's share of the market was so small as to be insignificant in terms of the overall market which the Government delineated.

Thus Hazel-Atlas was not a significant factor either in the theoretical beverage and soft drink container market or in the theoretical carbonated drink container market, nor had it ever been. In view of the limited acceptance of cans for these end uses Continental was scarcely more of a factor. Hazel-Atlas did not compete in these markets, and the acquisition did not lessen competition in either of them to any remotely significant degree.

The Government also contends, as it did with respect to beer, that Hazel-Atlas was a potential competitor in the manufacture of beverage bottles and that anti-competitive effects may arise because such potential competition was eliminated by the merger. However, it was not established that there was any reasonable probability that Hazel-Atlas would have become a significant factor in the manufacture of soft drink bottles had the acquisition not taken place.

While Hazel-Atlas had produced a few satisfactory beverage bottles prior to the merger, its experience in this field [fol. 4331] was extremely limited and it had made only minor and very tentative efforts to sell such a product. Its facilities for decorating beverage bottles were inadequate, it had no franchises from any of the large bottlers such as Coca Cola which required their bottle manufacturers to be franchised, and the Hazel-Atlas management felt that small bottlers were not desirable customers since they were poor credit risks. With the exception of a brief passage in a speech by a Hazel-Atlas officer in 1954 which pointed out some of its difficulties in this area, there was nothing in the record indicating any likelihood that it would become a significant competitor in this field. The

⁷⁷ Continental's shares of the overall market for 1956 and 1957 as shown on G-801(3e) include the bottles produced by Hazel-Atlas during those years.

conclusion that it might have become so at some indeterminate time in the future is mere speculation.

The Government also urged that the acquisition reduced the incentive of Continental to press its metal can line for packaging soft drinks. There was not the slightest evidence to support this theory. Quite apart from the considerations regarding Continental's diversification program, already discussed, there was in fact no reduction in Continental's activities in promoting soft drink cans after the acquisition.

Thus I find that the Government failed to establish either a line of commerce consisting of "containers for the soft [fol. 4332] drink industry" or a line consisting of containers for carbonated beverages. Moreover, even had it done so there was no showing of any reasonable probability that the effect of the acquisition would be substantially to lessen competition or tend to monopoly in either of such product markets.

(7) "Containers for the canning industry."

The line of commerce which the Government denominated "containers for the canning industry" included all metal cans and glass containers for the end uses of "canning" food. "Canning" was specifically defined by the Government as "the process of sterilizing foods, including juices, by heat and hermetically sealing them in tin cans and glass containers."

The Government's case as to this line of commerce was predicated on its definition of "canning." Yet the statistics concerning metal cans and glass containers which it placed in evidence to support this line⁷⁸ cannot be equated to its definition. These statistics related to glass and metal containers used for foods generally and were not limited to containers for foods which were heat sterilized and hermetically sealed. Though a number of foods are hermetically sealed when packed, many are not hermetically sealed and many others, though hermetically sealed, are not heat sterilized. Containers for all of these kinds of food were nevertheless included in the Government's figures.

⁷⁸ G-801(1c), (2c), (3c).

The tables introduced did not show which of the containers included were used to pack either heat sterilized or hermetically sealed foods, or both, and which were not. Some of the products included, moreover, such as coffee, were not even considered to be foods.⁷⁹

Thus there were no universe figures in the record as to the amount of containers used for canning food as this term was defined by the Government, or any showing as to Continental's share of the metal cans, Hazel-Atlas's share of the glass containers, or their combined share of the containers of both types shipped for such end uses.

"Containers for the canning industry" was one of the [fol. 4334] lines of commerce specified by the Government before the pre-trial sessions began and its definition of this product market remained unchanged until after the case had been concluded. However, after defendants, upon argument of their motion to dismiss, had pointed out the deficiencies in the Government's proof as to this product market, the Government abandoned its claim that there was such a line of commerce. It then advanced for the first time the theory that the process of heat sterilization should not properly be included as a factor in defining this line and that only hermetic sealing was significant.

Thus, after all the evidence was in, the Government attempted to substitute an entirely different line of commerce for the one which it had theretofore consistently advanced. The new line was composed of glass containers and metal cans used to pack hermetically sealed foods and its boundaries were quite different from those of the line on which the case had been tried and on which the defense had been conducted.

However, the Government was in no better position to

⁷⁹ Excluded from the Government's definition of canned foods by one or both of the food experts who testified for the Government, were such items as coffee, mayonnaise, vegetable oil, shortening, syrup, concentrated fruit juices, pasteurized whole milk, pasteurized barbecue sauce, maraschino cherries, green and Spanish olives, peanut butter, nuts, condiments, frozen fruits and vegetables. Some items such as vinegar, pickles, fruit preserves and fruit jellies were excluded by one expert and included by the other.

sustain this new line of commerce than it had been to sustain the old. It was apparent that the statistics in evidence combined both containers for foods which were hermetically sealed and those for foods which were not. For example, they included undetermined amounts of con-[fol. 4335] tainers used to pack a large variety of products such as mayonnaise, mustard, honey, whole milk and baking powder, which were not hermetically sealed. Indeed the figures included metal cans and glass containers used to pack all types of food in the following categories: Fruits and vegetables (including juices); evaporated and condensed milk; other dairy products; meat (including poultry); fish and seafood; coffee; lard and shortening and all other food.

Thus the Government's statistics on its revised theory of this product market did not give any universe figures for shipments of glass or metal containers, or both, used to pack hermetically sealed foods. Its figures were not and could not be broken down to show totals for foods hermetically sealed and those not hermetically sealed. Nor was there anything in the record from which to ascertain the amounts of cans in either category produced by Continental or by other manufacturers in the metal can industry, or the amounts of glass containers in either category produced by Hazel-Atlas or others in the glass container industry.

Thus, the Government's position in substance boiled down to this—that on the basis of statistics covering containers used for packing all types of food, whether hermetically sealed or not, and with no showing as to the proportions [fol. 4336] of containers used for hermetic sealing it sought to have the court find a line of commerce consisting of metal cans and glass containers used to pack hermetically sealed foods only.

It is manifestly impossible on the basis of such figures to determine the boundaries of a product market consisting of metal and glass containers for hermetically sealed foods. Nor can it be ascertained, in terms of end uses, what products were packed in hermetically sealed containers and what products were not.

Moreover, there was no showing that there is any public or industry recognition of such a product market, or sub-

market. Nor did any of the other indicia for determining whether there was such a relevant product market show that such a market or sub-market exists.

There remains only what appears to be some suggestion by the Government that there might be a product market consisting of metal cans and glass containers used to pack all of the types of food products included in the Government's statistics.

Such a line of commerce commends itself neither to logic nor to the realities of the market place. It not only includes a vast number of disparate products but it excludes a large number of similar products. If milk bottles are [fol. 4337] included, as they apparently are, why are paper milk cartons excluded? If screw top glass jars for hard candies are included, why are not cellophane bags for such candy also included? If jars and cans for spices are included in the market, why not cardboard containers, with or without metal ends, for spices?

Again, as in the case of the claimed product market for hermetically sealed foods, there was no public or industry recognition of any such product market as was suggested. The metal cans and glass containers included within it do not have the same physical characteristics and uses. Their shapes, sizes and other characteristics differ widely, depending upon the type of food to be packed in them. The characteristics of metal cans and glass containers used for packaging food do not differentiate them from cans and glass containers used for other purposes. Metal or glass food containers were not sold differently or shipped differently from non-food containers.

There was no showing of reasonable interchangeability of use or cross-elasticity of demand as between metal and glass containers used for packing food. At least sixty categories of foods are packed either in cans entirely, or almost entirely, or in glass entirely, or almost entirely.⁸⁰ [fol. 4338] The Government went to some pains to have F.B.I. agents observe, on the shelves of chain stores in Atlanta, Chicago, Los Angeles and Washington, D.C., food products of different kinds, a number of which were available both in glass and metal containers, and a number only

⁸⁰ Defendants' Exh. N.

in glass or only in metal. But, except in limited instances, there was no information as to such factors as differences in price, size or quality of the products packed in the containers which were compared. There was no explanation as to why such differences in packing as there were occurred.

There are literally thousands of packers purchasing containers for packing hundreds of food products. The only three packers who were called to testify packed between them only 25 different food products. They represented but a tiny segment of the packing industry and of the products which the industry packed and there was no showing that they were representative. Only eight of the twenty-five products packed by these witnesses were packed in both glass and cans. The small quantity of string beans packed in glass did not sell. A few boiled onions were packed in glass because, for some obscure reason, "eye appeal" was important to certain people purchasing boiled onions. In the case of other of the eight products packed in both glass and cans, only glass was used for consumer sizes and only cans for the large institutional sizes.

[fol. 4339] The three packers called made it clear that different kinds of machinery and different cooking processes had to be used for packing in glass and packing in cans.

It can scarcely be said that this testimony shows any general interchangeability of use or cross-elasticity of demand as between glass and cans. The fact that in some instances similar products were packaged in two or more different types of containers, or that at times one kind of container has supplanted another in the packing of the same product, does not show that different types of containers are generally commercially interchangeable.

Choice of type of container in which to pack a particular product may be dictated by a variety of factors, including traditional or changing preferences of the buying public, eye appeal, the nature of the trade to be served, the physical characteristics of the product to be packed, the type of packing process required, distance to outlets, and other diverse factors. But the record is barren as to the extent to which specific factors of this nature affect the choice of metal or glass containers in which to pack the enormous

varieties and kinds of food products included within the broad range claimed for this product market.⁸¹

[fol. 4340] Metal cans and glass containers used for packaging food do not have unique production facilities. The manufacturing equipment and processes and the raw materials for each, far from being interchangeable, are entirely different. Moreover, as has been mentioned, the machinery used to pack food products in glass containers and the packing process are different from that used for packing in metal cans.

There was no evidence to show that the thousands of packers of food products who purchase metal cans or glass containers, or both, fall into any categories of distinct classes of customers. In fact, one of the glaring deficiencies in the Government's proof on this line of commerce, and elsewhere in the case, was its failure to make any detailed inquiry into the customer pattern.

Nor was there any evidence of a distinct price structure for metal cans and glass containers used for food products, or of correlation or correspondence of prices between them. Indeed, the paucity of evidence on the subject of prices and pricing practices was another major deficiency in the Government's proof.

There are no specialized vendors of containers used for food products. Can manufacturers and glass manufacturers each sell their own products directly to users who in most instances have multiple sources of supply. There are apparently no jobbers or wholesalers who sell either cans [fol. 4341] or glass containers, or both.

Much of what has been said concerning a product market consisting of metal and glass containers used to pack all types of foods applies also to a market composed of such containers for hermetically sealed foods only. Such limited examination as was made in this case of the practical indicia

⁸¹ For example, ground coffee is packed 99% in cans and paper bags and less than 1% in glass. Soluble (or instant) coffee, on the other hand, is packed 99% in glass and 1% in cans. Catsup is packed in glass for the consumer market and in cans for the institutional market. (Defendants' Exhibit N.) There is no explanation of these differences.

for determining whether a product market exists did not establish that there was any line of commerce consisting of metal cans and glass containers used either for packing food products generally or for food products hermetically sealed.

It is therefore scarcely necessary to discuss the question of proof of anti-competitive effects in such product markets. It is sufficient to say that the Government failed to show any reasonable probability of substantial anticompetitive effects or of tendency to monopoly in these areas as a result of the Hazel-Atlas acquisition.

(8) "*Containers for the toiletries and cosmetic industry;*"

(9) "*Containers for the medicine and health industry;*" and

(10) "*Containers for the household and chemical industry.*"

In each of these three lines of commerce respectively the Government sought to include, in terms of end use, glass, metal and plastic containers of every type used by the industry designated. Since such statistics and figures as were introduced to support these lines of commerce are inextricably confused and cut across all of them, and since the problems concerning them are in essence the same, they will be discussed together.

Each of the groups of manufacturers categorized as an "industry" produce a very wide range of products and use containers to package their products of many diverse kinds, shapes, sizes, materials and characteristics. For example, the numerous products packed by a representative group of companies in the toiletries and cosmetic industry include dentifrices, cosmetics, deodorants, face creams, bath salts, lipsticks, face powder, shampoos, colognes, hair dressings, medicated powders, analgesics, hand creams, nail polish, eye shadow, and hair spray. The containers used in packaging such products include glass containers, glass aerosols, metal aerosols, aluminum foil, paper, collapsible metal tubes, including lead and aluminum tubes, brass cases, plastic containers, both squeeze type and others, cloth, cans

and paperboard boxes. Glass containers of various kinds are used more frequently than the others.

Manufacturers grouped in what is called the household and chemical industry manufacture an even wider range of products running into the hundreds, if not the thousands. [fol. 4343] To mention only a few, there are such disparate products as car wax; embalming fluid; insecticides; silver polish; inks; hydrochloric, nitric, sulphuric and other acids; chlorination liquids; rust removers; pet cleaners; weed killers; glue, blueing; and photographic chemicals. The containers used range from small cans to large glass carboys to fibre drums and include a wide range of materials.

What is called the medicine and health industry covers the whole range of medical and health products, including such items as prescription drugs, topical lotions, foot powders, rubbing alcohol, mercurchrome, throat and mouth sprays, eye drops and ear drops, cough syrups and cough drops, first aid kits, absorbent cotton, and bandaids. Again the varieties and types of containers used to package the various products produced are extremely wide.

While it is apparent that the number of products produced by each of these industries is exceedingly large and varied, the scope of the respective industries was not shown by the evidence. There were no figures showing the extent of these industries and it cannot be determined which companies or which products are included in them and which are excluded. The statistics in the record do not show either unit or dollar figures for metal or plastic containers used in packaging products in these industries either separately or combined. It is impossible to determine what share Continental or Hazel-Atlas had of the container business in these fields either before or after the acquisition.

The statistical tables of Continental's metal can production include a category covering all non-food products and indicate that in 1955, 1956 and 1957 Continental shipped approximately 30% of the total shipments of such containers.⁸² This figure includes cans for such products as pet food and motor oil which plainly do not come within the

⁸² G-801(2f):

compass of any of the industries with which the three lines of commerce under discussion here are concerned. There was nothing to show what percentage of Continental's non-food metal can shipments fall into these categories nor what the shares of Continental are in the overall shipments of containers for use by these industries.

There were no figures at all showing what percentage of plastic containers for these industries were sold or shipped by Continental, though there is an estimate that Continental sold between 7 and 9% of polyethylene bottles, tubes, jars and carboys and about 6% of the plastic squeeze bottles shipped in 1955.⁸³

[fol. 4345] The three industry classifications used to delineate these lines of commerce were taken from the Bureau of Census categories for the glass industry. The Bureau of Census figures, expressed in totals only, and not broken down by individual companies, were in turn obtained from the Glass Container Manufacturers Institute which used these categories to collect statistics from its members.⁸⁴ The Census Bureau used quite different categories in collecting figures for the metal can industry and had no figures at all for the plastics industry.

There were figures indicating that in 1955 Hazel-Atlas shipped about 10% of the narrow neck bottles and about 40% of wide mouth glass containers for the household and chemical industry. It also shipped about 9% of narrow neck glass containers and 28% of wide mouth glass containers for the toiletries and cosmetic industry, and about 6% of narrow-neck and 25% of wide mouth glass containers for the medicine and health industry.⁸⁵

But there were no totals for plastic and metal container shipments to these three industries. Nor were there any totals for the combined shipments of glass, plastic and metal containers to them with which to compare the Hazel-Atlas figures, or any showing of what the Hazel-Atlas [fol. 4346] share of such totals might be.

⁸³ G-810.

⁸⁴ See fn. 28, *supra*, p. 22.

⁸⁵ G-800.

Apart from its failure to produce evidence showing the size and scope of the product market said to be embraced within these three lines of commerce, the Government also failed to show any other factors establishing that such lines of commerce existed.

There was no public or industry recognition of any such product markets either separately or in combination.

There was no showing that the containers which were sought to be included had peculiar characteristics and uses. The wide variety of sizes, shapes and kinds of containers and of different products packed in them has already been referred to. Plastic containers could not be used at all to package a goodly number of products because plastic is too porous. There are other differences between the products sought to be included such as the use of opal glass jars to package certain types of products and flint glass jars and bottles for others; the peculiar characteristics of the plastic squeeze bottle and of the aerosol type of container; the differences in design, decorative features and fitments of various types of containers; and the differences in weight between glass, metal and plastics. Moreover, there are many other materials used to package products included within these industry categories which are excluded entirely [fol. 4347] from consideration here without explanation.

It was not shown that the general characteristics and uses of the various types of containers used for packing products in any one of these industries were the same or that their characteristics and uses necessarily differentiated them from containers used in other industries, or, indeed, for other purposes entirely. Containers used by these industries were not sold or shipped differently from any other containers.

It did not appear that there was any reasonable interchangeability of use or cross-elasticity of demand between containers made of these different materials. It is true that glass container, plastic container and metal container manufacturers are each seeking to promote their lines of containers at the expense of other lines, and that all are attempting to improve their products or to develop new ones so as to have a wider customer appeal. But, as has

been pointed out, this, in itself, does not establish reasonable interchangeability.⁸⁸

Here, as in the case of foods, the choice of container may be dictated by a wide variety of factors, as the testimony of the witnesses from companies engaged in the manufacture of toiletries and cosmetics showed. In this field [fol. 4348] plainly the matter of customer appeal is of paramount importance. The physical characteristics of the product to be packed and the nature of the trade to be served also have a major effect on the choice of a container for a particular product.

It is true that manufacturers from time to time may shift a product from one type of container to another. But there does not appear to have been any general shifting back and forth as between the containers used for a given product. Packaging changes are made only after careful research and investigation and are normally permanent in character. For example, switches for a particular end use from glass to plastic and back from plastic to glass do not appear to occur.

The Government lays some emphasis on the packaging of light duty detergents. Such detergents in powder form were originally packed in paper containers. When light duty liquid detergents were developed they were first packaged in glass containers since no other container was functionally suitable. After a modification in the product formula, light duty liquid detergents changed from glass to metal containers. Most of them now are packed in plastic containers and apparently the product has never returned to the container from which it was shifted.

Again, as in the case of foods, the Government introduced evidence as to observations of F.B.I. agents of products on the shelves in chain stores and department stores. These observations indicated that some products were sold in containers made of glass, plastic and metal, some of glass and metal, and some of metal and plastic. Other products, on the other hand, were sold only in one type of container.

But, as in the case of foods, with limited exceptions, no observations were taken as to differences in sizes, prices,

⁸⁸ See *supra*, pp. 47-50.

or quality of products, the uses for which they were intended, or any other factors which might determine the choice of the container for them. There was no showing that the products packed in containers made of the same material represented any substantial proportion of the total number of products included within these industries. On the contrary, it appears that in the larger stores, at least, there were thousands of products on the shelves which might be classified as sold by these industries and the products found in containers made of the same materials represented only a small proportion of the total.

As to the medicinal and health and household and chemical industries, there was no evidence that there were any distinct classes of customers engaged in purchasing all three types of containers, though some overlap could certainly be expected in view of the great number of different products being packed by these industries.

As to the toiletries and cosmetic industry, certainly the principal toiletry and cosmetic manufacturers normally purchased all three types of containers. This again was to be expected in view of the large number of different kinds of products which they packaged and is of no particular significance in the line of commerce context.

There was no distinct price structure for the three kinds of containers included within these lines of commerce. It appears that plastic containers have been and remain considerably more expensive than glass containers. While a number of toiletry and cosmetic manufacturers take some account of differences in prices between the various kinds of containers, as they would be expected to do, it does not appear that this is a dominant or controlling factor in selling a container for a particular product. While manufacturers of one type of container pay some attention to the prices of other types, it was not shown that there was any correlation or correspondence of prices between the three types of containers.

There is no evidence that there are any specialized vendors for containers of these types. Manufacturers sell [fol. 4351] their own products directly to users who appear to have multiple sources of supply.

Here again the Government failed to establish the lines of commerce which it specified either separately or in com-

ination. There is no showing that there are any product markets consisting of metal, plastic and glass containers for use by the toiletry and cosmetics, medicine and health, or household and chemical industries. Inter-industry competition between plastic, metal and glass manufacturers in the sale of containers to package some products included within these industries there no doubt is, but separate relevant product markets in the anti-trust sense were not shown to exist.

Again, since no lines of commerce have been established there is no necessity for discussing the Government's claims as to anti-competitive effects of the acquisition in such lines. It should be said, however, that none of the numerous witnesses representing toiletry and cosmetics manufacturers or the representative of the largest plastics containers manufacturer who testified with respect to these lines of commerce, indicated that the Hazel-Atlas acquisition had had or was likely to have any effect of any kind on their own businesses or generally. All gave a picture of healthy competitive conditions both before and after the acquisition with no suggestion of any anti-competitive effects or tendency to monopoly.

[fol. 4352]

VII

Conclusion

The evidence, in the record at the close of the Government's case has been weighed not only as a whole but as to each of the ten lines of commerce on which the Government relied until the end of the trial, as to such possible alternative lines as the Government suggested after its case had been concluded, and as to any other product markets which may have existed. Such inferences have been drawn from the evidence on each aspect of the case as were reasonably justified.

After doing so, I concluded that the proof submitted by the Government established only three of the ten lines of commerce or relevant product markets which it attempted to delineate in this case—the metal can industry, the glass container industry and containers for the beer industry. As to these product markets I found that there was no

proof of any reasonable probability of substantial anti-competitive effects or tendency to monopoly in any of them as a result of the acquisition of Hazel-Atlas by Continental.

I also concluded that the proof failed to establish that any of the other lines of commerce which the Government [fol. 4353] delineated or suggested were in fact relevant product markets or sub-markets. In addition, I concluded that there was no evidence in the record establishing any relevant product markets or sub-markets other than those relied upon or suggested by the Government.⁸⁷

Moreover, even assuming that any such product markets existed, I have found there was no proof of any reasonable probability of substantial anti-competitive effects or tendency to monopoly as a result of the acquisition in any of them.

Thus, the Government wholly failed to sustain its burden of proof in this case.

Some measure of its failure of proof here can be gathered from a comparison with the proof adduced in the *Brown Shoe* case. I do not mean by this to suggest that the proof in *Brown Shoe* sets any minimal standards for determining Section 7 violation. However, such a comparison is illustrative of the deficiencies in the Government's proof in the case at bar.

[fol. 4354] The *Brown Shoe* case involved a merger, both horizontal and vertical, of two companies in a single, well-recognized, separate industry. In the case at bar, on the

⁸⁷ I found that vacuum type closures and screw and lug type closures while not forming a product market in combination, each constituted a separate product market. These products did not compete with one another to any significant degree. Their respective product markets were not areas of effective competition in the context of this case and were not "relevant" in that sense. (See pp. 85-87, *supra*.)

The plastic container industry was a recognized separate industry (see pp. 33-35, *supra*) and may constitute a separate product market. However, the Government made no attempt to establish such a relevant product market here.

other hand, the merging companies were each in different industries and the merger was almost entirely of a conglomerate nature. I have already pointed out the different problems presented by conglomerate mergers and horizontal or vertical mergers, the difficulties of proof in a conglomerate case and the necessity in such a case for detailed examination of all of the factors which might bear on relevant product markets and anti-competitive effects within them.⁸⁸

In the light of the differences between the two types of cases, it is particularly significant that the proof in *Brown Shoe* which impelled the Court to strike down the acquisition there, went far beyond the proof adduced in the case at her.

For example, in *Brown Shoe* there was "[t]he testimony in the record from numerous independent retailers, based on their actual experience in the market, demonstrat[ing] that a strong, national chain of stores can insulate selected items from the vagaries of competition in particular locations and that the large chains can set and alter styles in footwear to an extent that renders the independents un-[fol. 4355] able to maintain competitive inventories."⁸⁹ There was also evidence "that [the merger] creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies by eliminating wholesalers and by increasing the volume of purchasers from the manufacturing division of the enterprise can market their own brand at prices below those of competing independent retailers."⁹⁰

Moreover, the proof in *Brown Shoe* established lines of commerce within a single industry, well recognizable in terms of the commercial realities. There was detailed testimony as to specific and demonstrable anti-competitive effects in each of these lines of commerce in specifically defined economically significant geographic markets.

It was on evidence of this nature, taken in conjunction with proof of the market shares held by the combining com-

⁸⁸ *Supra*, p. 53.

⁸⁹ *Brown Shoe Co. v. United States*, *supra*, at p. 344.

⁹⁰ *Ibid.*

panies and the trend toward concentration in the industry, including Brown Shoe's own part in that trend, that the Court found that the Brown Shoe—Kinney merger violated Section 7.

[fol. 4356] Here, in contrast, seven of the ten lines of commerce which the Government attempted to carve out were artificially contrived and were neither recognized as separate product markets nor comported with market realities. Beyond this, as to no product market in the case at bar was there evidence from competitors in the relevant industries, from buyers of the products involved, or from any other sources, that there was reasonable probability of any anti-competitive effects, substantial or otherwise, or any tendency to monopoly as a result of this acquisition.

Lacking evidence to sustain its burden, the Government speculated as to what might happen as a result of the acquisition. In the light of the record these speculations were at best mere possibilities. There was no proof of reasonable probability that such anti-competitive effects as the Government foresaw were likely to occur or that, if any of them did occur, they would be substantial.

It has been said that "• • • mergers are a common form of growth; they may lessen, increase, or have no effect upon competition. A merger as such involves no necessary connotations of coercion, dominance or lack of effective competitive pressures."⁹¹

[fol. 4357] As far as the record here shows the merger under scrutiny in this case had no such connotations and, in fact, had no significant effect upon competition in any product market. This merger was not shown to be one of those proscribed by Section 7 of the Clayton Act.

Thus, at the end of the Government's case it was apparent that the Government had not succeeded in establishing any violation of Section 7. Defendants were therefore entitled to judgment which will be entered accordingly.

⁹¹ Report of the Attorney General's National Committee to Study the Anti-Trust Laws, March 31, 1955, p. 124.

1654

This opinion constitutes my findings of fact and conclusions of law in this case pursuant to Rule 52(a), F.R.C.P.
It is so ordered.

Frederick van Pelt Bryan, U.S.D.J.

Dated: New York, N. Y., April 15, 1963.

[fol. 4358] [File Endorsement Omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

Civ. 112-387

UNITED STATES OF AMERICA, Plaintiff,

vs

CONTINENTAL CAN COMPANY, INC., AND HAZEL-ATLAS GLASS
COMPANY, Defendants.

JUDGMENT—April 16, 1963

The issues in the above entitled action having regularly been brought on for trial before the Honorable Frederick van Pelt Bryan, United States District Judge on June 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, July 1, August 12, October 3, 4, 5, 6, 10, 11, 13, 14, 17, 18, 19, 20, 24, 25, and December 9, 1960, and the Court having handed down its opinion constituting its findings of fact and conclusions of law on April 16, 1963, it is

Adjudged: that the defendants have judgment against the plaintiff.

Dated: New York, N.Y., April 16, 1963.

James E. Valeche, Clerk.

[fol. 4359] [File Endorsement Omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED
STATES—Filed June 14, 1963

I. Notice is hereby given that the plaintiff, United States of America, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on April 16, 1963, dismissing the complaint at the close of the government's case under Rule 41(b), F.R. Civ. P. This appeal is taken pursuant to 15 U.S.C. 29.

II. The clerk will please prepare a certified transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States; and include therein the entire record before the district court, including the pleadings, the transcript of testimony, the exhibits submitted by the parties and this notice of appeal.

III. The question presented by this appeal is whether the government met its burden of establishing that the acquisition by Continental Can Company of Hazel-Atlas Glass Company violated Section 7 of the Clayton Act, so that the district court erred in granting defendants' motion to dismiss at the close of the government's presentation of evidence.

Lionel Kestenbaum, Melvin Spaeth, William H.
McManus, Attorneys for the Plaintiff.

Dated: June 14, 1963.

[fol. 4360] PROOF OF SERVICE (omitted in printing)

[fol. 4361] Clerk's Certificate (omitted in printing)

[fol. 4362] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1963

- No. 367

UNITED STATES, Appellant,
vs.

CONTINENTAL CAN COMPANY, et al.

ORDER NOTING PROBABLE JURISDICTION—October 28, 1963

Appeal from the United States District Court for the
Southern District of New York.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted.

[fol. 1]

GOVERNMENT'S EXHIBIT 1

Obear-Nester Glass Co.
Manufacturers of
Flint and Amber Bottles
Office and Factory
East St. Louis, Ill.

March 4, 1954.

Mr. Dick Cheney, Director of Market Research and Promotion,
Glass Container Manufacturers Institute,
8 West 40th Street,
New York 18, New York.

Dear Mr. Cheney:

I am enclosing, for your information, a letter received from the Continental Can Company, regarding baby foods.

Very truly yours, Obear-Nester Glass Co., Joe, President.

JMN:MC

[fol. 2]

GOVERNMENT'S EXHIBIT 2

Obear-Nester Glass Co.
Manufacturers of
Flint and Amber Bottles
Office and Factory
East St. Louis, Ill.

March 24, 1954.

Mr. Richard L. Cheney, Research & Promotion Dept.,
Glass Container Manufacturers Institute,
8 West 40th Street,
New York 18, New York.

Dear Dick:

Some time ago I forwarded you a letter which was distributed by the Continental Can Company in the St. Louis area.

I am enclosing herewith another piece of literature from the same source.

This time give me your thoughts on this matter, or any recent developments that you may have, which you think would be of interest to me.

With kindest personal regards, I am,

Sincerely, Obear-Nester Glass Co., Joe, President.

J. M. Nester/MC

[fol. 3]

GOVERNMENT'S EXHIBIT 3

April 2, 1954.

Mr. J. M. Nester, President
Obear-Nester Glass Company
East St. Louis, Illinois

Dear Joe:

Please pardon the delay in replying to your letter of March twenty-fourth in which you enclosed the letter sent out by Continental Can Company to mothers in the St. Louis area.

Your letter of March fourth did not reach here until March eighth, shortly before my departure for the West Coast where I attended the annual West Coast meeting, did some work on the carbonated beverage situation in that area, and gave some help to Frank Wright in connection with his work in handling the West Coast activities.

Both of these letters from Continental burn me up. The first one is really very vicious in its handling of breakage and glass chips and of course the second one is greatly exaggerated as to the savings that could be affected by purchasing of baby food in cans.

The way I figure it, in order to accomplish the amount of savings shown, 2.73% of all the baby food in the United States would have to be sold in St. Louis, which has only .56% of the population of the country.

Other than this it shows that the can industry is beginning to fight back more aggressively in this field where it is losing ground to glass. You will be interested to know that the 1953 figures, just obtained from the National Canners' Association by 'phone shows that glass packed baby food represented 62.1% of the market in 1953. This is up one percentage point from the 61.1% of the market in 1952.

Continental are taking the most direct means possible by using direct mail to the mothers. In many states it is possible to obtain the names of new mothers from the official records and I think it is the custom of most of the baby food packers to do direct mail promotion in this way. This is obviously smart, since mothers represent a rela-

tively small percentage of the population and advertisements placed in general circulation magazines have a considerable proportion of "waste" circulation when you are just trying to reach the mothers.

Also, I am sure that we would find that Continentals are picking the border line markets where glass and cans are splitting the business somewhere near fifty-fifty, to see if they can reverse the trend to glass there. If successful, presumably they would spread their efforts.

My thoughts at present as to the best way of putting pressure on them to tone down the viciousness of their letters would be to get Libby, McNeill and Libby, Heinz or one of the other of the baby food packers who uses considerable quantities of cans to put the pressure on them and point out that they are hurting the preserved foods industry in general, and their customers in particular with these tactics. I think we could probably get them to clean up their copy by this means.

This brings up once more the whole subject of whether or not we should jump in and do some real promotion on baby food now that the trend is running in our direction, and we have almost a two to one position in the market. This may be the time to put the pressure on.

As you may know, Heinz are doing a great job in California and although we have not been able to find out how their sales are going, they have succeeded in getting very wide distribution with their glass, so that in many retail outlets the Heinz and Beech-Nut glass packed section equals or exceeds the Gerber canned section.

I am sending copies of the two letters which you have been good enough to send to me to our Marketing Committee, and scheduling the subject for discussion at the meeting on April fourteenth. I will be interested in talking with you about the subject when you are here on the fifteenth.

Meanwhile, Joe, I wonder if I could ask you to obtain, if possible, from whoever turned these letters over to you, samples of all letters they may be receiving from the baby food packers, particularly Beech-Nut or Libby, McNeill and Libby.

The latest report I am able to find is one dated in January, 1950 which shows that those two companies are the

only ones in glass in the St. Louis market. If further shows that Libby had a 53% distribution position in the stores there and Beech-Nut only a 1.6% which leads me to believe that they were just introducing Beech-Nut at that time. I presume they now have a considerably larger part of the market. Do you have any way of knowing how the matter does stand there now? Could you tell which brands are in glass and what proportion of the display space they occupy in the average store.

Until the Committee gives me freedom to contact the baby food packers, it is difficult for me to obtain this type of information except in those cities where the local news-[fol. 5] papers conduct an annual survey of distribution of household products in their area. It happens that right now neither of the St. Louis papers are conducting such surveys.

Thanks very much, Joe, for your interest in sending these things along to me and I hope that I have not bored you with this long letter of reaction.

With kindest regards to you and the family,

Sincerely, R. L. Chaney, Director, Market Research
and Promotion.

RLC:bvn

[fol. 6]

GOVERNMENT'S EXHIBIT 14

March 4, 1957.

Mr. R. C. Langsett
Armstrong Cork Company
Lancaster, Pennsylvania

Dear Bob:

The consumer attitude survey which touched upon ice cream toppings, about which I spoke to Russ Thompson at the Canners Convention, was our 1954 nationwide survey of consumer attitudes, conducted by Ford Sammis & Company.

Using a scientifically selected sample of about 10,000 consumers, this nationwide survey should accurately rep-

represent the attitudes of all housewives, as it was distributed by region, size of city, age groups, income level, etc. on a scientific basis.

Enclosed are 5 copies of a photostat of page 8 from this report which shows 41% of the consumers preferring glass jars for ice cream toppings against 36% who preferred cans, with a 23% "no preference" group whom we believe should be swinging to glass as a result of our nationwide advertising.

I hope these will be helpful to you and since I presume you never saw the original survey from which this was taken, I am enclosing copy #7 of this whole survey so that you can see the material I am sending in its context.

Under the rules by which we operate, these surveys are sent out to our members on a library loan basis and so as soon as this one has served its purpose we will ask that you return it to us.

It was good to see you in Chicago, Bob, and I hope you continue to enjoy living in the East.

With warmest regards.

Sincerely yours, R. L. Cheney.

RLC:CH
Attachments.

[fol. 7]

GOVERNMENT'S EXHIBIT 24

June 20, 1958.

Mr. J. S. Henisler
Maryland Glass Corporation
2147 Wicomico Street
Baltimore 30, Maryland

Dear Stan:

As requested, I have made a quick study of the present economic relationship between bottles made from the new linear or "high-density, low-pressure" polyethylene and glass bottles. I also give you below some thoughts on the market competition that this new polyethylene bottle offers to glass.

We understand this plastic (which is trade marked "Marlex-50" by Phillips Chemical Company but is also

manufactured by other companies under different names) sells to bottle makers for about 35¢ a pound. The most optimistic figures I have been able to find as to the eventual cost of this material is 28¢ a pound.

If we assume that the cost of glass at the feeder is \$30 a ton (the best estimate I can develop here) and that the cost of forming the plastic containers is the same as the glass container, when we know the relative weights of the bottles we can get an approximation of their comparative costs. I have chosen a pint-size bottle for comparison and find that when made of linear polyethylene it weighs 20 grams or 0.72 ounces. A similar bottle in glass weighs 8½ ounces. That is, the glass bottle weighs about 12 times as much as the plastic bottle. At 35¢ a pound for the polyethylene, material costs become \$700 a ton but we need only 1/12th as much to make the same number of bottles, so that the polyethylene bottle will cost about twice as much as a glass bottle. At 28¢ a pound for polyethylene this relationship drops down to 1.6 times as much as glass. [fol. 8] Freight savings also enter in and the 11/67 pounds difference between the weight of a case of 24 pint glass bottles and 24 pint polyethylene bottles would come to 4.3¢ per case at 100 miles, 5.6¢ per case at 200 miles, and 6.8¢ per case at 300 miles from the shipping point. To arrive at this I have assumed freight rates of 37¢ per CWT, 48¢ per CWT, and 58¢ per CWT, respectively. These are the rates in this part of the country pertaining to household bleach, a typical household product that might possibly be bottled in this material.

At six case per gross this brings added freight costs on products packaged in the glass bottles to 25.8¢ per gross at 100 miles, 33.6¢ per gross at 200 miles, and 40.5¢ per gross at 300 miles.

These calculations seem to tie in pretty well with the figures given in the story starting on page 92 of the June 1958 issue of Modern Packaging Magazine describing the use of this type of polyethylene bottle by Breck's.

That article states that the plastic bottles cost approximately twice the glass and after allowing for shipping savings the plastic containers still cost 20% more than glass. They go on to point out in this article that while "when polled in market tests, a significant majority of

women request products in plastic containers, yet they buy glass rather than plastic when they shop. They are not yet convinced of the prestige and functional qualities of the plastic package." As we all know, the economics of the situation is only one of many factors in the selection of a particular package by the consumer. The qualities of the container other than cost may be far more important than the cost.

While it is true that the new linear polyethylene is only one-fifth as permeable to most products as the conventional type polyethylene, it is still permeable and compares unfavorably to glass in this respect.

Here are some figures taken from the Technical Bulletins put out by Phillips Chemical Company about their "Marlex-50." Listed is the percentage weight lost for the given product that will occur during one year's time when stored in Marlex-50 polyethylene bottles at 80°F. temperature:

[fol. 9] Clorox	0.33%
Carbon tetrachloride	80.3 %
Pentane	299.3 %
Benzine	142.0 %
Ethyl acetate	8.70%
Ammonium hydroxide	1.57%

These were based on tests of four months duration using 4-ounce Boston round-shape polyethylene bottles. What it means is, for example, that all the pentane would be gone in about a third of the year and all the benzine in about nine months.

While the rate of permeation of the new polyethylene may be lower than that of conventional polyethylene, it certainly cannot be said that any permeation is a good thing and therefore this is a distinct disadvantage of the polyethylene bottle. In addition to this is the fact that the bottle is not transparent but only translucent, that they have a feel which does not give the impression of cleanliness, and that on the counters of the stores dust tends to accumulate and cling to these bottles, giving them a poor appearance. This last feature alone has probably done more to slow up the sale of products in the older polyethylene bottle than any other factor.

Summing it all up, there is not doubt that the light weight

and increased strength of the new linear polyethylene bottle, together with its improved physical and chemical properties over the old polyethylene will increase the potential market for bottles made of this substance. Glass has a great many advantages and a strong consumer preference which will make any invasion of the markets now enjoyed by glass containers by linear polyethylene bottles a relatively slow and difficult process.

I will let you know any additional information I may uncover during my forthcoming trip.

With kindest regards,

Sincerely, R. L. Cheney.

RLC/bg

[fol. 10]

GOVERNMENT'S EXHIBIT 31

October 21, 1958.

Mr. William J. Green
Thatcher Glass Manufacturing Company, Inc.
375 Park Avenue
New York 22, New York

Dear Bill:

Here are our GOMI statistics for September and the first nine months of the year. I have a flag up to get Department of Commerce figures to you immediately on their release, but in the event they do not come through before you make your task, it is my estimate that they will show glass container shipments for the first nine months to be 0.6% ahead of 1957.

As of the end of August, Department of Commerce figures were running 1.3 percentage points above ours in relation to the cumulative period this year against last year.

Other items which might be of possible use to you are as follows:

1. Attached clipping from Food Field Reporter of October 13, 1958, "Hazel-Atlas To Close Two Of Its Factories." This is evidence of the trend of our industry to decentralization and I should think it could be used as a springboard to show the foresight which

your company has exercised in its plant locations, being several years ahead of many others in the industry in this respect.

2. Clipping from Food Field Reporter of October 13, 1958, "Labor To Influence Can Prices In 1959." This frankness on the part of Mr. Stolk can only mean that the can industry anticipates trouble on the cost price squeeze from here on and is preparing its customers for increases which in my opinion will be greater than those necessary in our industry. In other words, I think our competitive position as against cans is going to improve.

[fol. 11] 3. The contrary is probably true with regard to our competition with plastic bottles. The declining cost of polyethylene and the ability to make lighter weight bottles from the new linear polyethylenes (which are also more impervious than the other polyethylenes) spells increasing competition for glass from this source.

However, it can be pointed out that in the field where polyethylene has so far made its principal "inroads" (that of toiletries and cosmetics) the glass container industry has enjoyed its greatest rate of growth. Against an index of 1947-1949 equals 100, glass container shipments for toiletries and cosmetics at the end of 1957 stood at 195 as against an index number of 146.2 for the overall glass container industry.

Further than that, it is evident that for the next two or three years at least, the plastic bottle will be offering its principal competition in the household chemical field to cans (for detergents) rather than to glass since we still have a very substantial economy advantage as well as the well known advantages of impermeability and chemical inertness,—except where long freight hauls are involved. Also, new products in the chemical field (Lestoil, for example) keep coming along which are not chemically compatible with other materials in glass and cumulatively they bring large new volume into the industry.

4. In connection with the foregoing, we are able to look forward to the advances which are unquestionably going to take place in our industry in the direction of lighter, stronger, more economical glass containers as a result of the scientific research being done.

The Glass Container Research Corporation is concrete evidence of the effort that is being made in this direction and inasmuch as we are utilizing only 1% [fol. 12] of the theoretical strength of our material, the research scientists tell us that we will undoubtedly be increasing the strength utilization of our material by five or six times within the next ten years.

5. At long last it appears that we are on the threshold of a real sound opportunity to greatly expand the use of the no-deposit beer bottle. Reports from Pittsburgh indicate that the cone top "Little Brown Jug" bottle being used for "Tech" beer by Pittsburgh Brewing Company is having tremendous success. I was told just the other day by Knickerbocker that their sales of beer in one-way bottles are growing in New England and following the ban in Vermont, it has taken hold there again very well.

Of particular interest is the fact that Container Corporation has recognized the potential of the new lighter weight no-deposit beer bottle and tell us that they plan to take advantage of the general apprehension on the part of the brewers that the cost of cans are eating up their profits, by the introduction of a new wrap around six pack carrier with fully automatic equipment for the brewery at a cost of less than \$30.00 per carrier.

According to their figures, the new bottle with this six pack carrier would make economically possible the sale of six one-way bottles in a carrier, for from 7 to 9¢ per carrier less than six cans. Their sales manager is starting on a nationwide tour this month to attempt to get this established.

6. As to the coming year, the latest forecast we have from the Econometric Institute (copy attached and

paragraphs marked) is that they expect our industry to wind up with 1958 shipments 1.5% below the record 1957 level. (They expect that the heavy shipments in September have borrowed against October and that the last quarter will be lighter than the last quarter of 1957.)

[fol. 13] They forecast that the twelve months ending June 30, 1959 will show a 1.5% increase over the corresponding twelve months a year earlier and they tell us over the phone that the forecast which they will give at our meeting at Sea Island will indicate that they expect the third quarter next year to continue at about this 1.5% higher rate for 1958.

I will watch for further timely items including the Department of Commerce figures and will get them to you as fast as they appear.

I thought you might like the foregoing at this time so that you could be thinking about it.

With kindest regards,

Sincerely, R. L. Cheney.

RLC:CH
Attachments.

SURVEY
of
MARKET
PROBLEMS
of the
GLASS
CONTAINER
INDUSTRY

**SURVEY
of
MARKET PROBLEMS
of the
GLASS CONTAINER INDUSTRY**

As presented by Richard L. Cheney to members
of Glass Container Manufacturers Institute, Inc.
at the Semi-annual meeting December 1, 1953

Copy No. 159 for the confidential use of:

CHARTS shown at semi-annual meeting are reproduced on right-hand pages of this report, numbered for reference.

COMMENTS made by R. L. Cheney are condensed on left-hand pages, facing charts to which they correspond.

REFERENCE MATERIAL, including statistics on which charts are based, are contained in the Appendix, which has a separate table of contents.

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In May, a five-man Market Survey Committee, consisting of:

F. P. Pollock, Chairman

J. S. Algeo

E. F. Ball

C. G. Bensinger

and W. V. Fisher

was asked to undertake a broad survey, for the purpose of analysing the market problems facing the glass container industry, with the following broad objectives:

1. To evaluate the competition from other container materials in our various markets, and
2. to formulate a positive approach toward the promotion of glass containers in these markets.

The writer was asked to handle the mechanics of this project under the direction of the committee; and he has personally carried out most of the field work, statistical research and analysis. However, to help secure guidance in the use of the most effective market research techniques, the services of Mr. Ford Sammis, Marketing Economist, have been widely used. (Interviews with the manufacturers of competitor packaging materials and with packers and chain stores were handled by Mr. Sammis or his trained interviewers.)

In the course of this project I have travelled over 40,000 miles, have talked with representatives of the U. S. Department of Commerce and Agriculture, a great many members of G. C. M. I., with the managers of some 15 trade associations, the research directors of Corning Glass Works, Hartford Empire Company, Wyandotte Chemical Company, Battelle Memorial Institute, and of several members of this industry, and many others in related fields, and with such people as financial analysts, magazine editors and home economists. I have made an extensive library research of all magazine articles bearing on the subjects involved, which have appeared in the past three years.

[fol. 18].

It would be my purpose before any further steps were taken, to complete my calls upon members of G. C. M. I., for the best part of what I have learned has come from the intelligent, practical people in our industry with whom I have talked.

The valuable and whole-hearted cooperation of General Manager, Mr. Victor L. Hall, and all of my other associates on the G. C. M. I. staff is gratefully acknowledged.

The Problem

The glass container industry is faced by a number of alarming surface indications that competition from other container materials may be rapidly increasing in aggressiveness and potential effectiveness.

The first phase of our problem is, of course, to measure the relative position of the glass container industry and its several powerful opponents in the ensuing battle for a larger share of the over-all packaging market.

Next, we have to count the possible cost of lost markets against the cost of defending them; and again, the cost of developing new markets as against the value of these markets to the industry.

Or, to borrow a term from the new science of "Operations Research", we may, in a non-professional way, apply the "Principle of Least Regret". We shall endeavor, as near as possible, to measure all the factors in the equation mathematically. Then perhaps we can determine whether it is wiser to look the other way, save our money, and hope the bugaboo will go away; or, perhaps to take a calculated risk, and make an investment out of present profits (such as they are) in a campaign which gives promise of winning the battle for wider markets and increased profits.

R. L. Cheney

New York, New York

November 25, 1953

**WHAT IS
HAPPENING**
in the
**OVER ALL
PACKAGING
INDUSTRY ?**

The glass container business is part of a large and growing industry: The packaging industry. It is a \$9,000,000,000 industry today, and McGraw-Hill Publishing Company forecasts it will reach a value of \$10,850,000,000 by 1960.

Figures on this chart became available for the first time in July, 1953.

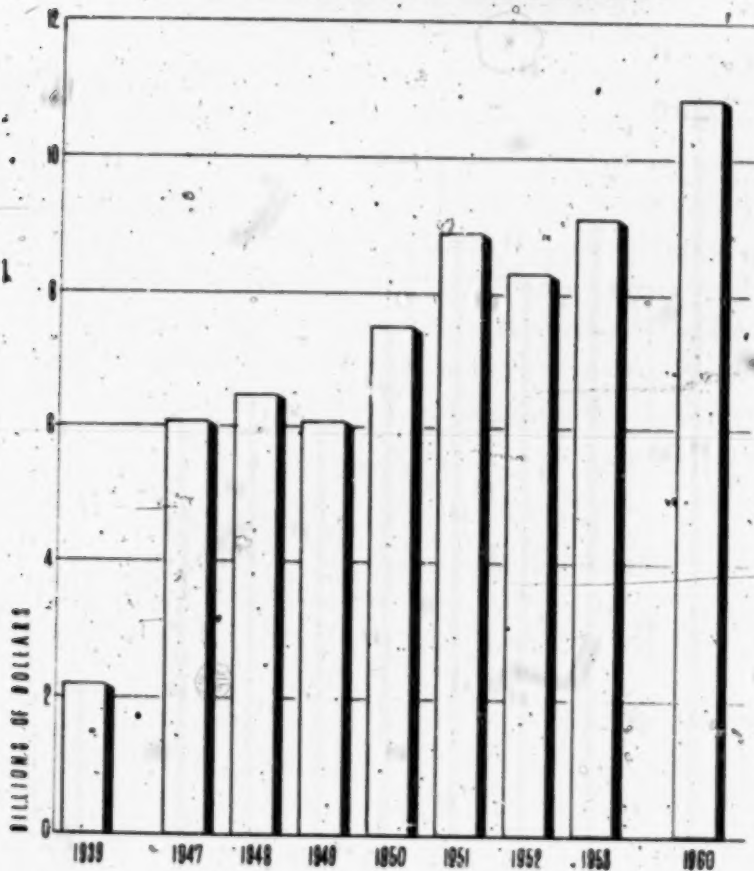
Data for 1947 and 1951 were prepared by the Division of Interindustry Economics, Bureau of Labor Statistics. Data for other years represent estimates by McGraw-Hill Publishing Company, utilizing the same sources and techniques used by the Bureau of Labor Statistics.

[col. 21]

PACKAGING

A \$9 BILLION INDUSTRY

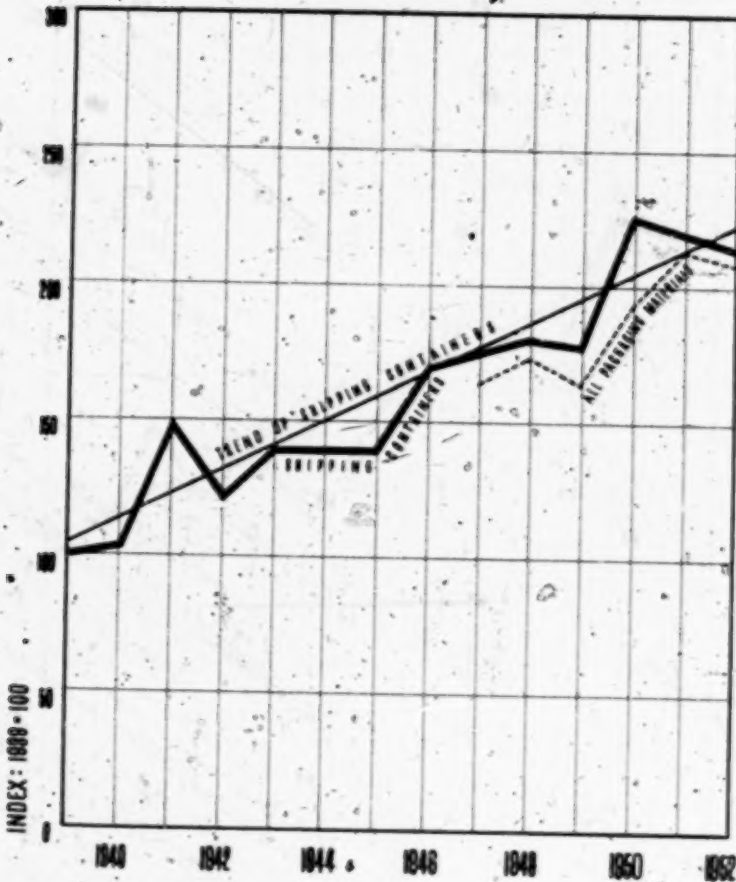
1676



[fol. 22]

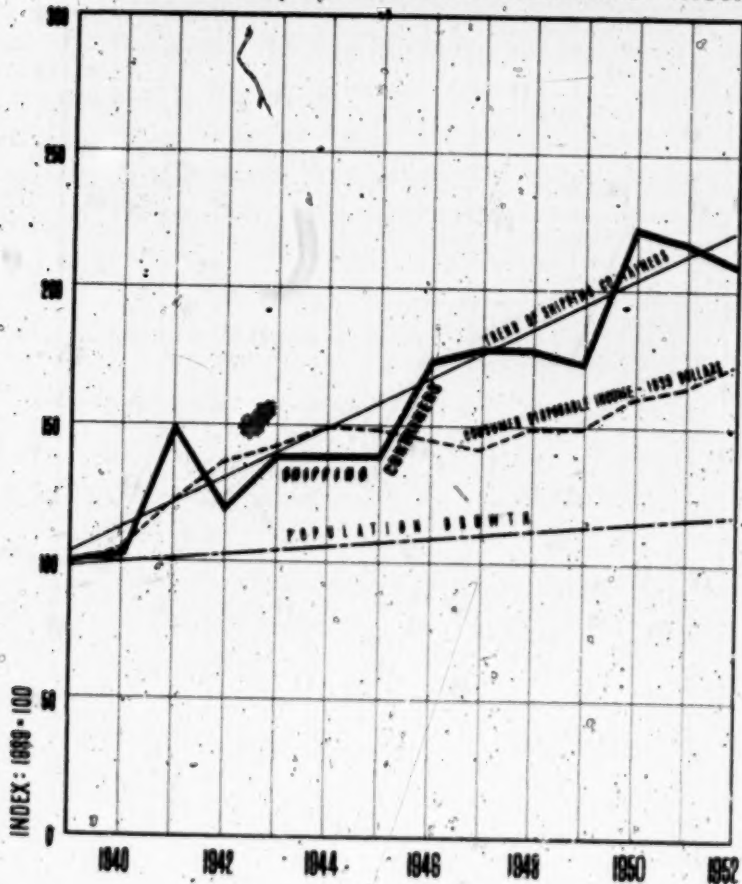
The use of corrugated and solid fibre shipping containers is generally considered to be indicative of the trend in the use of retail size packages. On this chart the solid red line shows the year-to-year shipments of the shipping containers in thousands of square feet of paperboard used in their manufacture, plotted as index numbers based on the year 1939 equals 100. The dotted line represents an index (1939 equals 100) of total packaging volume, as set forth in the preceding chart. The trend line of shipping containers as shown here, will be used on subsequent charts as a basis for comparing the growth of the different packaging materials. It will be noted here that the total of all packaging materials falls somewhat below this trend line in recent years, indicating that small packaging (retail sizes) is growing somewhat faster than the over-all packaging market.

The PACKAGING MARKET IS EXPANDING



Here it will be seen that our trend line of the packaging industry is rising much faster than is population, and even faster than consumer disposable income. The latter is shown in 1939 dollars to eliminate the effect of inflation and to make this line comparable to the container trend line which is based on physical units.

The PACKAGING MARKET is GROWING faster than population or consumer income



[fol. 26]

Here is the way the \$8,592,000,000 packaging market is broken down. Note that glass containers represent 8% of the total and closures 2%. Metal cans represent 14%, and all paper-board boxes, cartons, etc. -28%. Note that this chart is in dollars, and represents the 1952 output of these packaging materials. Obviously, dollar value represents about the only common denominator in which these different materials can be compared.

The data are McGraw Hill estimates for 1952, based on Bureau of Labor Statistics figures for 1951. These estimates are purchaser values, obtained by adding estimates of marketing charges (such as transportation, warehousing, trade margins and excise taxes) to the manufacturer's value. Value of imports are included and exports are excluded.

GLASS CONTAINERS

have 8% of the packaging market

1682

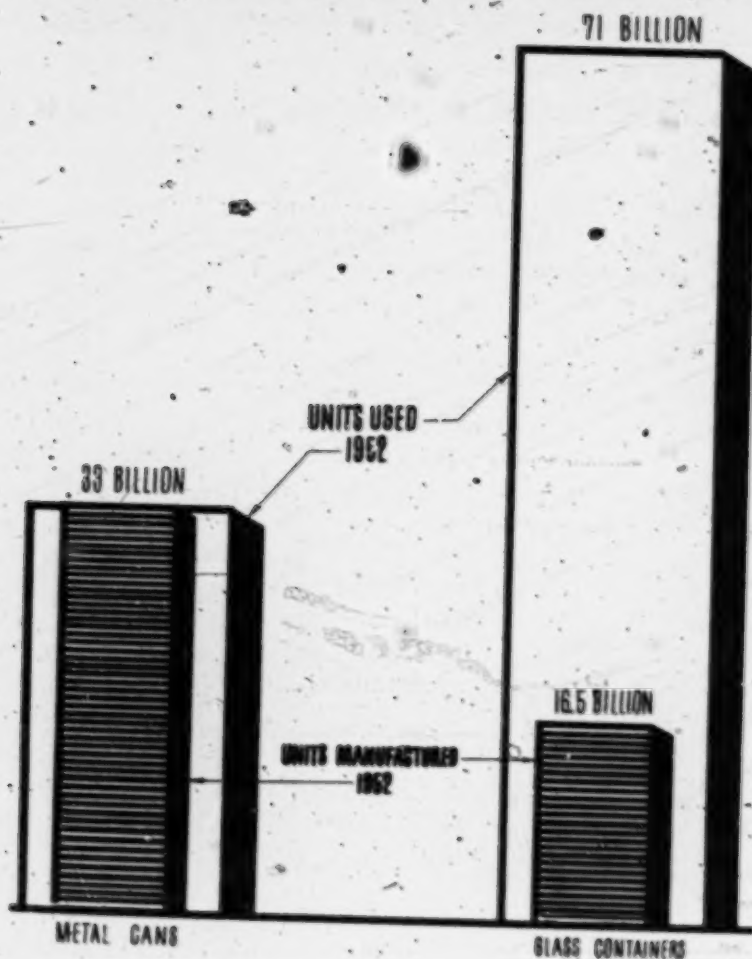
TOTAL		\$1,337,000,000	
MISC.		100,000,000	7%
TUBES, PAPER, SPINDLE, BULK		181,000,000	1%
FIBRE DRUMS & CANS		141,000,000	1%
CLOSURES		200,000,000	1%
METAL BARRELS, DRUMS, KEYS & PAIRS		210,000,000	1%
WRAPPING MATERIALS		404,000,000	3%
WOODEN BOXES & BARRELS		530,000,000	4%
PLASTICS... Bags, Containers, & Film		350,000,000	4%
GLASS CONTAINERS			
PACKAGING ACCESSORIES... Labels, Taps, Adhesives, Etc.		870,000,000	10%
BARNS... Papers & Textile		1,004,000,000	10%
METAL CANS		1,152,000,000	14%
PAPERBOARD... Boxes, Cartons, Etc.		2,806,000,000	25%

Because of the fact that many glass containers such as milk bottles, carbonated beverage bottles and beer bottles are re-used many times, glass containers are actually the most widely used rigid containers. Through a study of closure statistics we are able to determine that over twice as many glass containers "went to market" last year than metal cans. This, in spite of the fact that the can industry received almost twice as many dollars for their product as did the glass container industry, as indicated by the number of units actually manufactured in 1952.

Note: On all subsequent charts showing glass container volume, the data represent units actually shipped, and do not take re-use into account.

More

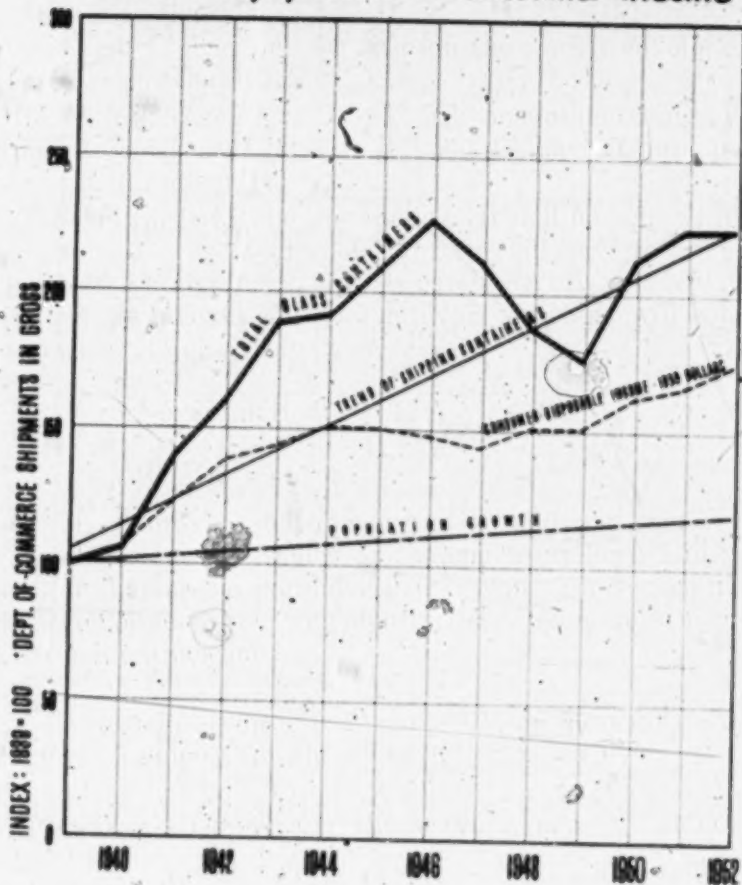
GLASS CONTAINERS ARE USED THAN CANS



Here it will be seen that even though we have lost a part of our war-time "bulge", the use of glass containers continues to grow faster than population or consumer disposable income. Glass containers have kept pace with our over-all trend line of packaging, although there seems to be some evidence of a leveling off in 1951 and 1952. This chart shows glass container shipments in gross, (not dollars) converted to index numbers in which the year 1939 equals 100.

GLASS CONTAINERS *are* GROWING faster than population or consumer income

168



The various end uses of glass containers are not expanding at the same rate. When glass container shipments are broken down into the four broad categories(*) of the industries we serve, we find food and chemical containers have retained a large measure of their wartime expansion, and continue to enjoy a higher rate of growth than the packaging industry as a whole. Beverage containers, while influenced by the normal ebb and flow of the returnable bottle business, seem generally to be trending above the rest of the packaging industry.

It is in the drug and cosmetic container categories where glass has been losing position. Glass container business in these fields is falling well below the general trend of packaging, and as will be seen later, hardly keeps pace with the growth of population.

(*) Almost all, if not all, companies in the glass container industry manufacture containers suitable for packaging most of the products now packaged or considered packagable in glass. Many containers may be used interchangeably for various products, and consequently, for most purposes, it is erroneous and improper to speak of a type, or a class, or a line, or a category, of glass containers as something separate and apart. For all practical purposes a glass container is a glass container, regardless of end use, or shape, or size, or other characteristics. In terms of a market analysis, however, we feel it is proper to indulge in classification by end or product uses, since it is the use of glass containers for these various products which we hope to stimulate as against the use of other packaging materials. Hence, when we refer to categories, or lines, to types, or classes of glass containers, we are really describing the end use for which the shipments were made.

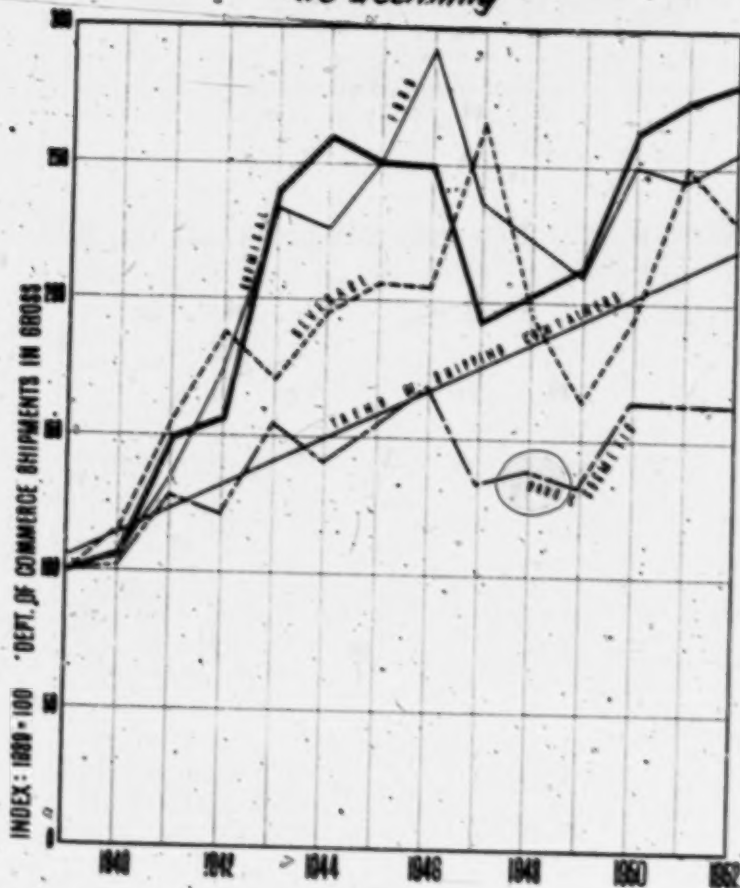
FOOD · CHEMICAL · BEVERAGE GLASS CONTAINERS

are growing at high rate

DRUG & COSMETIC GLASS CONTAINERS

are declining

1688



**WHAT HAS
BEEN
HAPPENING
in the
GLASS
CONTAINER
INDUSTRY ?**

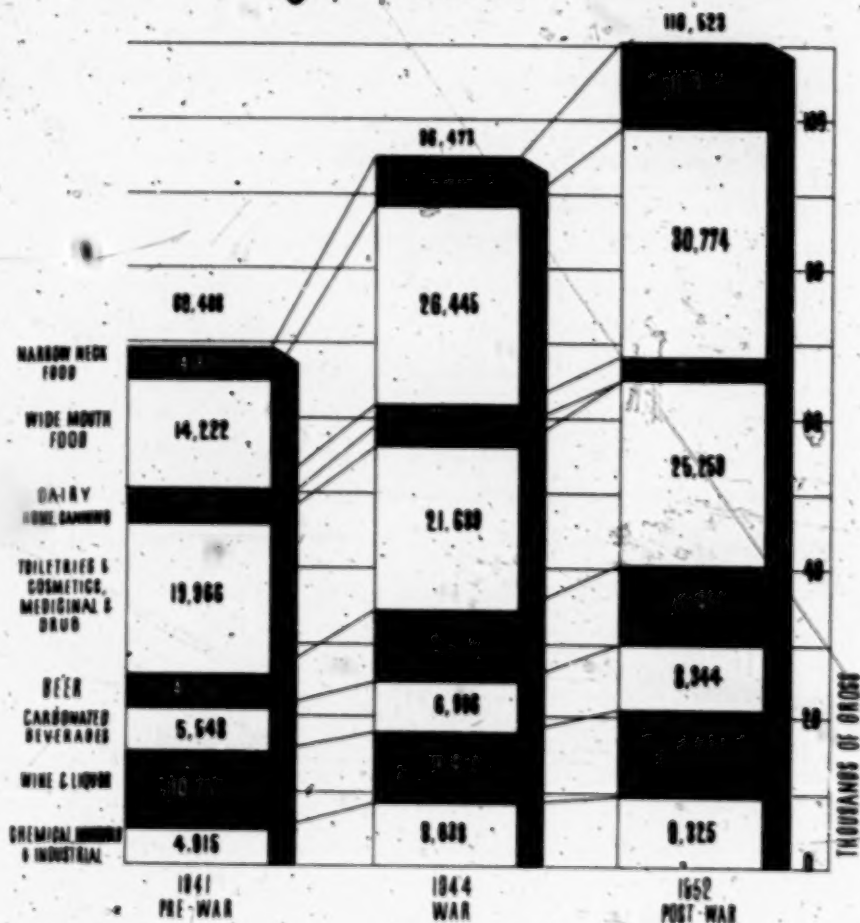
So much for the over-all packaging industry and the position of glass containers therein. In the series of charts which follow, we will take a long-range look at glass container shipments by individual classes of products.

Because all these charts are in terms of index numbers (1939 equals 100) in order to show trends, relative volume of the different classes of product is not apparent on the charts.

This bar chart, which shows pre-war, wartime, and post-war volume in thousands of gross, may be used for reference while studying the trend charts which follow.

GLASS CONTAINER SHIPMENTS

by classes



Prior to World War II the glass container industry was following a rather well defined upward trend which if continued through 1952 would have resulted in a volume last year representing about 154% of 1939, or approximately 76 million gross. As it was, the magnificent production job this industry did during the war to meet the packaging needs of the country during critical metal shortages carried glass shipments way above the pre-war trend.

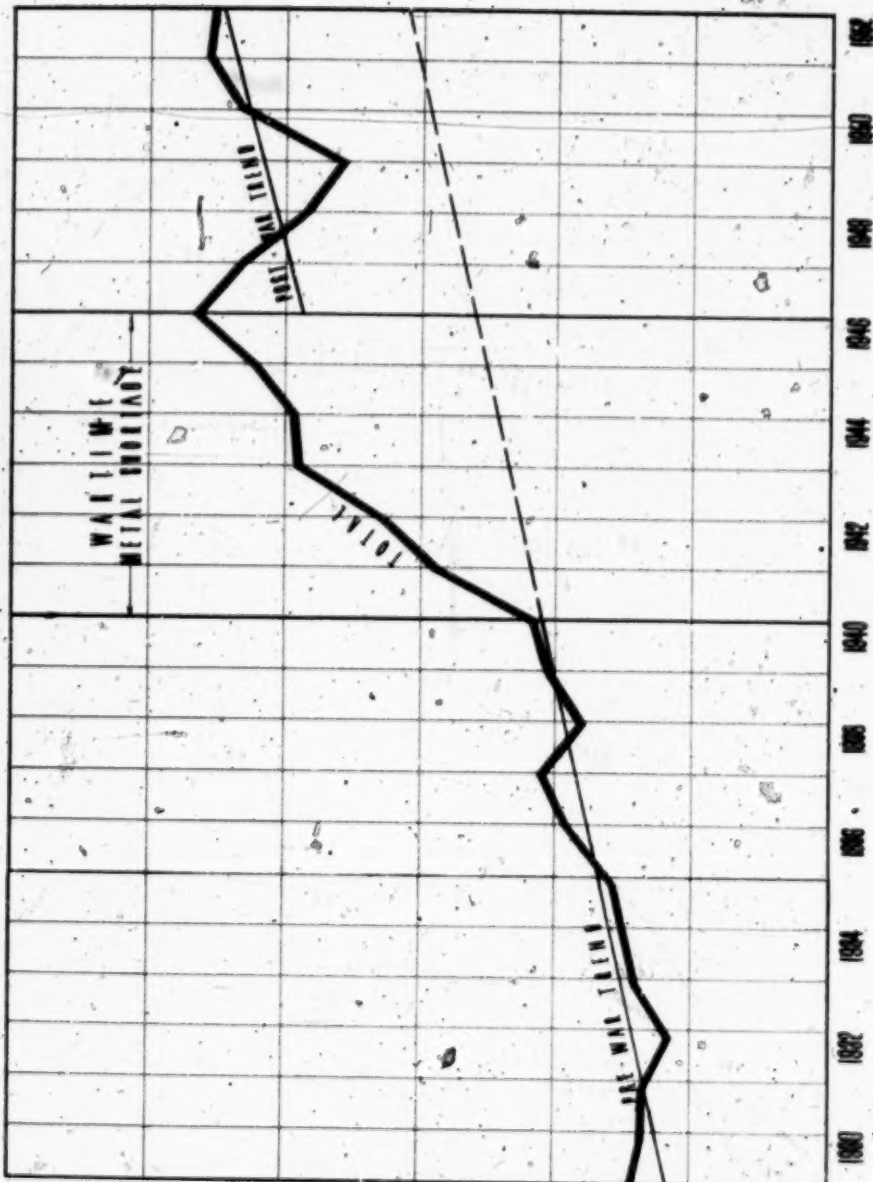
Following the war, some decline took place, followed by a sharp rise and then a leveling off. The post-war trend is not as well defined as pre-war, but it is not unreasonable to assume that it is picking up approximately the same pre-war trend, except at a considerably higher level.

1952 sales of about 111,000,000 gross (226% on the basis of 1939 equals 100%) is 46% above the 76,000,000 gross which would have been forecast for that year in 1939 without the artificial situation created by the war, it would have taken the glass container industry until 1968 to reach its present 1952 volume on a projection of the pre-war trend.

GLASS CONTAINER SHIPMENTS *All Classes*

[fol. 38]

1693



INDEX: 1939 = 100 DEPT. OF COMMERCE SHIPMENTS IN GROSS

1694

[fol. 39]

Narrow neck food bottles have maintained their wartime growth better than any other glass container line, as will be seen by comparison with the following charts.

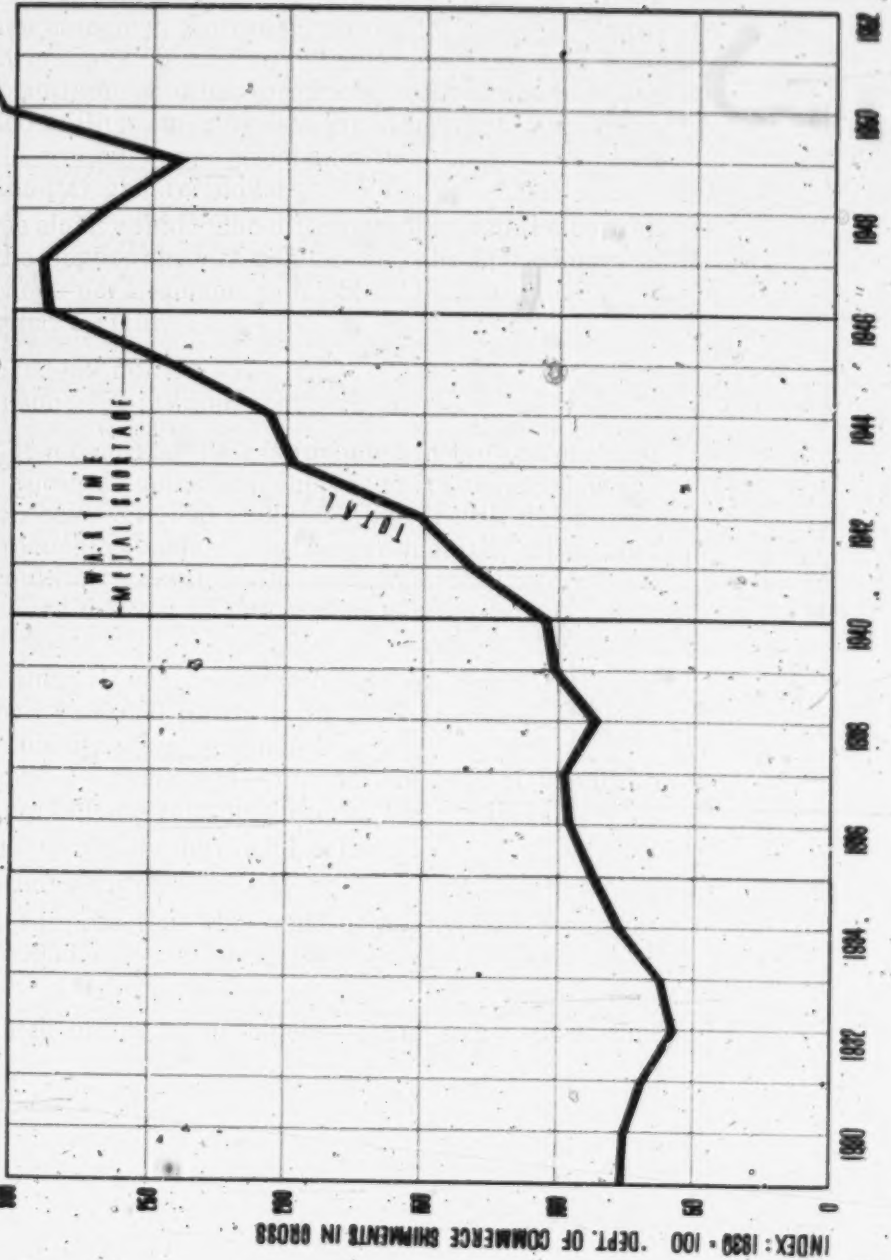
With 1952 sales standing at 324% of 1939, or almost 12,000,000 gross, it is evident that the public, having had an opportunity to buy syrups, salad oil and many other liquid food products in glass bottles, has made known its preference for this type of package in no uncertain terms.



[fol. 40]

GLASS CONTAINER SHIPMENTS

Narrow Neck Food



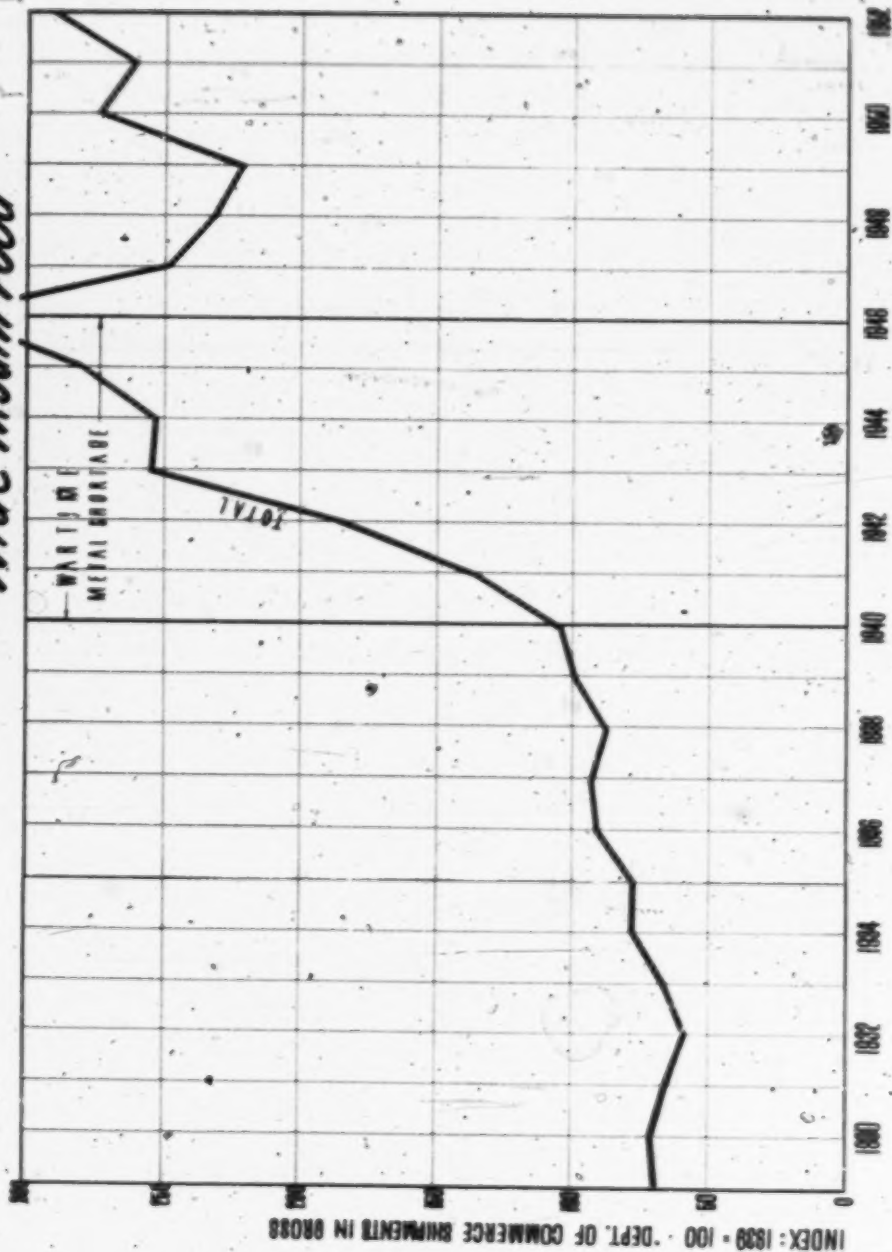
[fol. 41]

The wide mouth food jars experienced the greatest wartime increase of any type of commercial glass containers except beers reaching a peak of 332% of 1939, or 34,675,000 gross in 1946. This was to have been expected as the wartime restrictions on metal cans hit this field of packaging more heavily than any other. Only the limitations of the productive capacity of the glass container industry prevented this category from going much higher. That the level of the wide mouth glass food container business has been sustained at such high post-war levels is very encouraging, and largely accounts for the present highly satisfactory rate of operation in the industry. 1952 shipments of almost 31,000,000 gross represent about 794% of 1939 shipments of this type of ware.

GLASS CONTAINER SHIPMENTS *Wide Mouth Food*

[Vol. 42]

1697



This chart clearly shows two things:

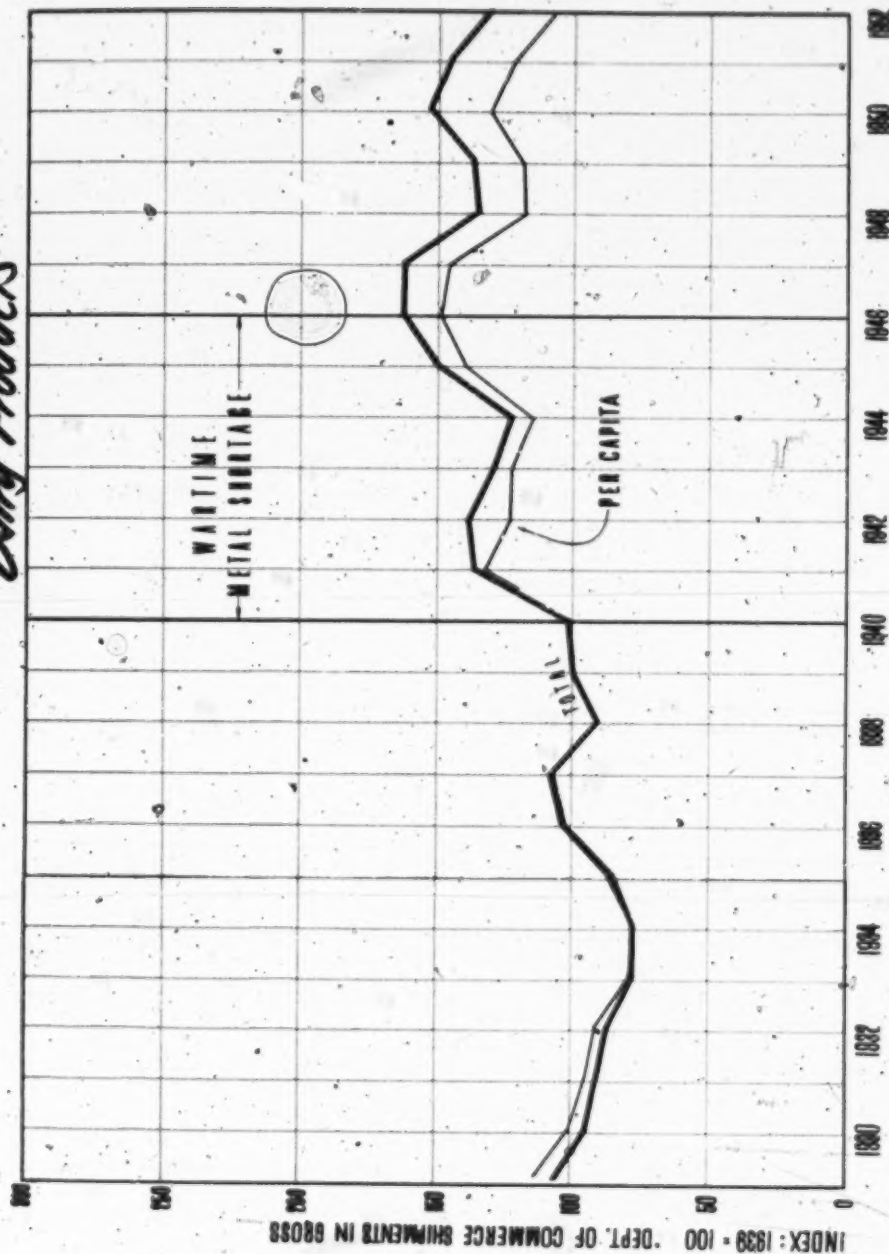
- (1) The cyclical nature of business in the returnable container field. Dairies tend to stock up on bottles and then work from their "float" for several years.
- (2) The other thing it shows is that unlike practically all other types of glass containers, milk bottle sales have barely kept pace with population increases. Index of per capita shipments is shown by light black line. That they are as high as they are (having lost a substantial portion of the retail store business to paper containers) is due only to rapid growth in the dairy business as a whole, and to increases in the per capita consumption of milk.

GLASS CONTAINER SHIPMENTS

Dairy Products

[fol: 44]

1699



[fol. 45]

At first glance this chart may not fully convey the plight of the home canning jar business. However, it will be seen that our index year (1939) was in itself a very poor year and was near the end of a long downward trend following the depression-born rush of home canning jar business in 1931-2. The victory garden program and other wartime stimulation to home canning is amply manifested here, carrying shipments of home canning jars to a 1943 peak of 4,358,000 gross. The inventory of these food jars in the hands of the housewife following seven years of all-time high production can be imagined. Couple this with the declining interest in home canning and the increasing number of packers' ware jars now carrying home canning finishes, and it is apparent why present shipments are well below 1939 and less than 1,000,000 gross per year.

The general decline in home canning activity is indicated in the following statistics from the U. S. Department of Commerce on the combined shipments of complete home canning closures and lids. (These are the only years for which data are available):

1947 - 19,313,112 gross

1948 - 21,525,040 gross

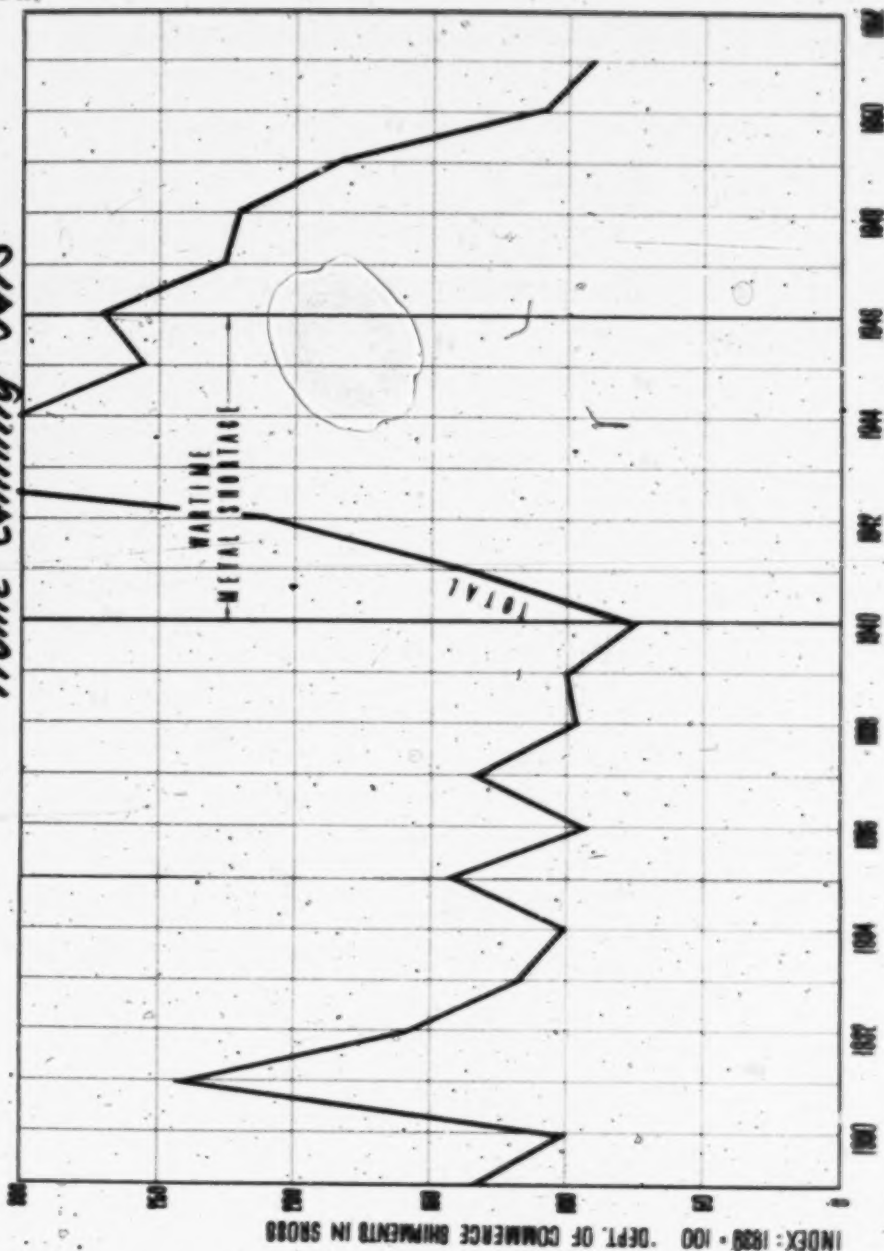
1951 - 16,234,185 gross

1952 - 15,226,324 gross

[fol. 46]

GLASS CONTAINER SHIPMENTS

Home Canning Jars



[fol. 47]

These classes are plotted together on one chart as they are not separated on available data for the years prior to 1944. It will be noted that unlike most types of glass containers, they did not receive any great stimulation during the war. The products represented here are traditionally glass packed products, and so there was no major conversion to glass to take place. Also, the trend in the medicinal field has been away from medicines in liquid form such as "patent medicines" to pills and capsules frequently packaged in paper or foil. It is in this field, too, that plastic containers have made most of their inroads.

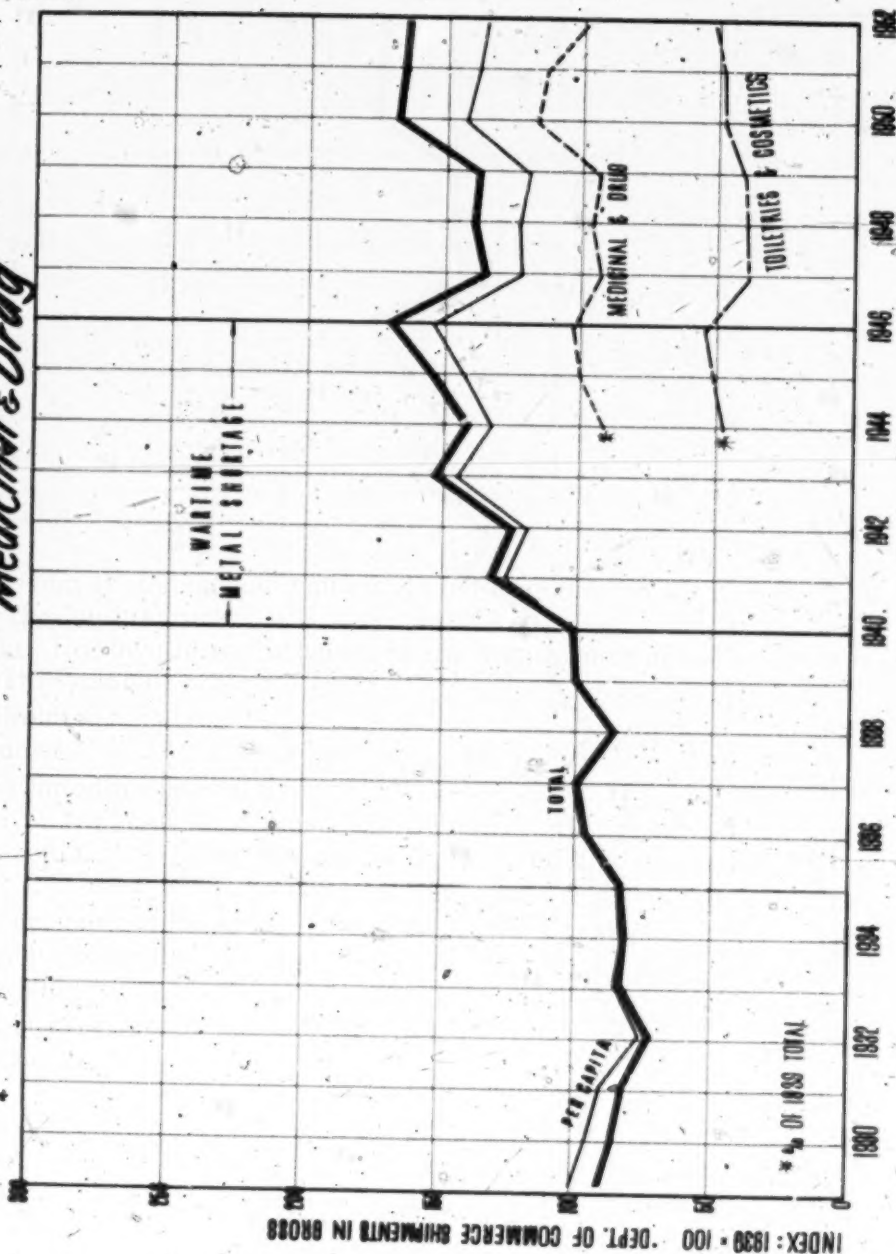
The solid black line represents per capita shipments of the two categories of ware combined. Per capita shipments in 1952 were only 38% above the 1939 level.

The breakdown between medicinal and drug ware and toiletry and cosmetic ware has been shown from the year 1944. Although it is not, perhaps, statistically valid to do so, these two separate types have been shown as a percentage of the total of the two categories in 1939 so that for any year the two categories added together will be found to total the combination shown by the heavy line on the chart. However, these two subsidiary lines bear no direct relation to the percentage scale based on 1939 equals 100.

GLASS CONTAINER SHIPMENTS

Toiletry & Cosmetic Medicinal & Drug

[fol. 48]



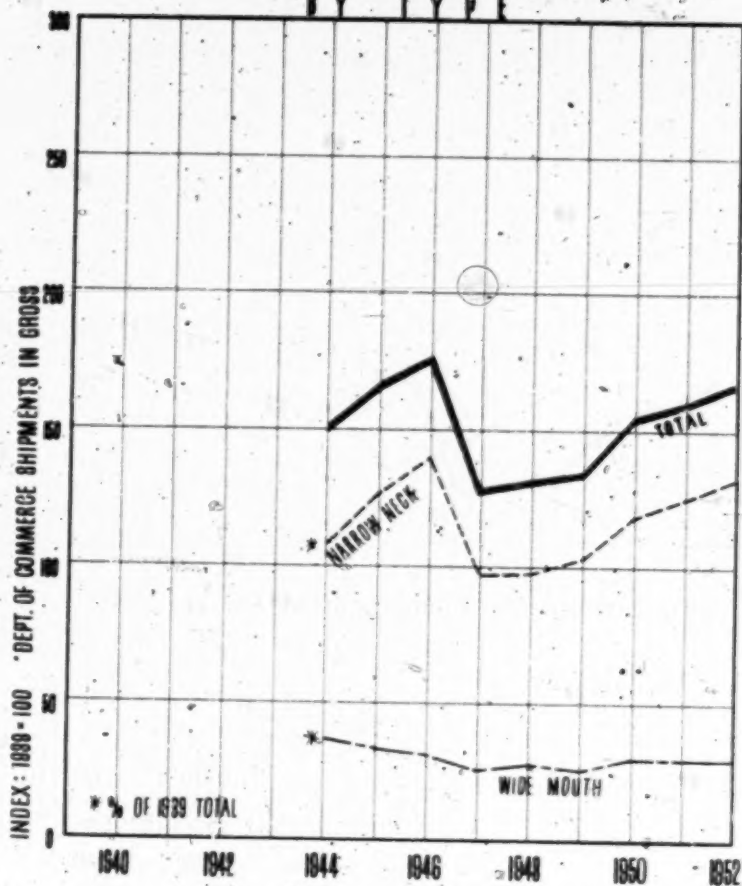
1703

Here the toiletry and cosmetic category is broken down into wide mouth and narrow mouth containers for the years for which this information is available. This shows narrow neck containers in this field to be faring better than wide mouth, and also to be experiencing greater fluctuation than the wide mouth jars.

On this chart and the following chart, both narrow and wide mouth shipments are expressed as a percentage of total shipments for 1939.

SHIPMENTS OF *Toiletry & Cosmetic Containers*

BY TYPE

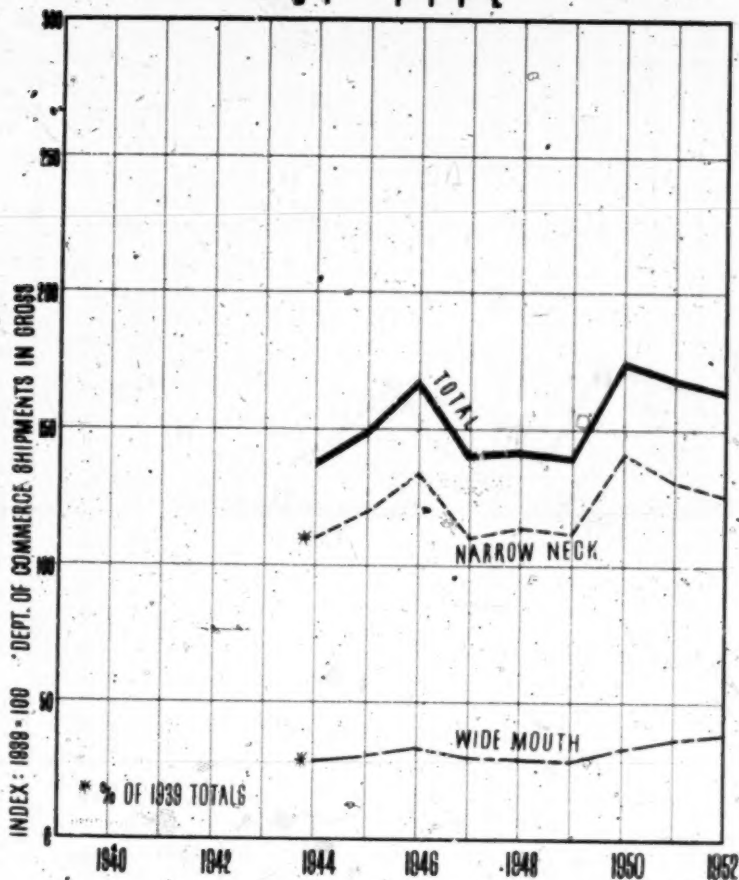


1706

[fol. 51]

This chart shows the breakdown between wide mouth and narrow mouth medicinal and drug containers. Wide mouth containers in this field have experienced a more stable trend than narrow neck, but have not increased at as rapid a rate.

SHIPMENTS OF *Medicinal & Drug Containers* BY TYPE



Starting with Repeal, this chart covering beer bottles discloses the customary cyclical nature of the sale of returnable bottles, and reflects significantly certain other influences.

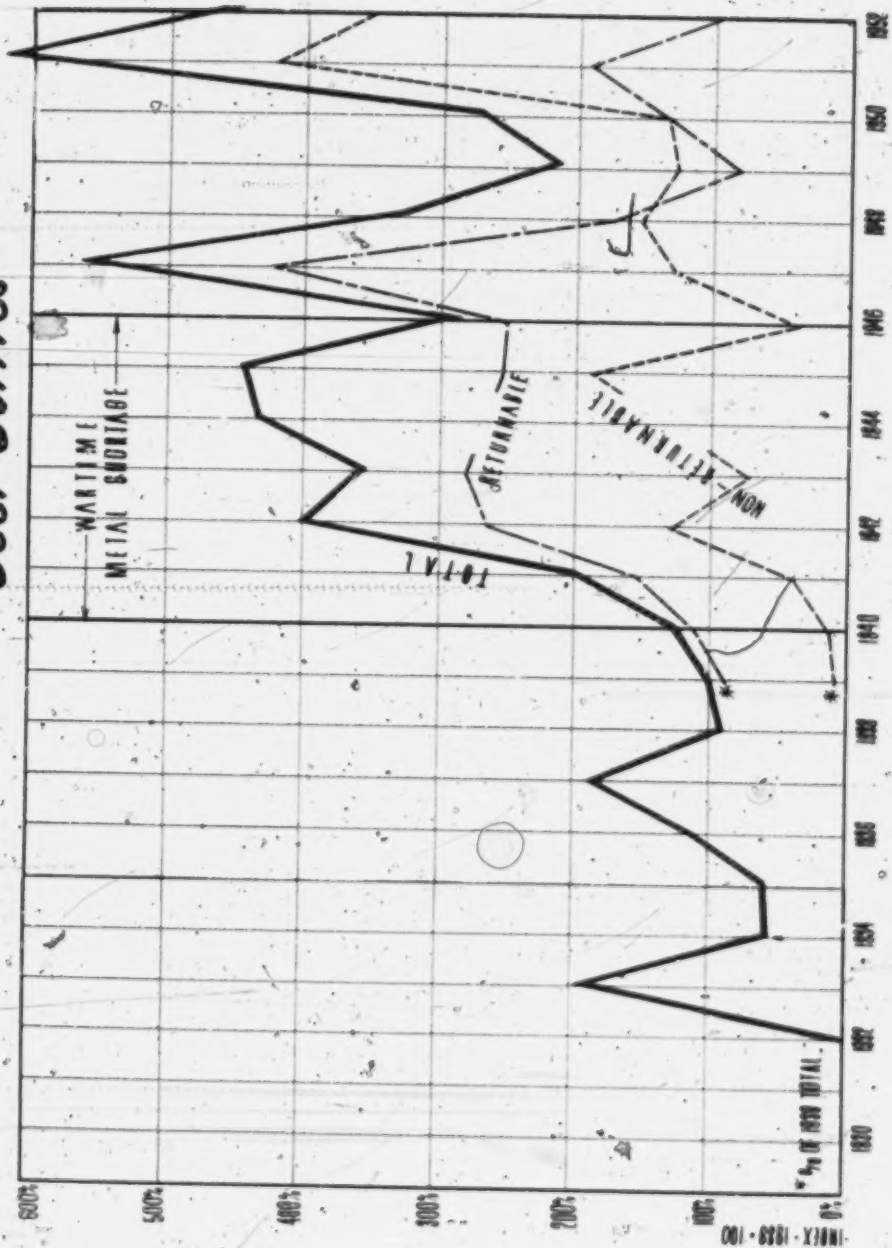
It is to be noted that the vertical scale on this chart is just one-half that of the other glass shipment charts in order to accommodate the imposing peaks encountered in 1947 and 1951.

The peak in 1937 is partly attributable to the introduction of the Steinie beer bottle, and the 1947 peak to the postwar restocking of returnable bottle "floats". The 1951 peak, representing a spectacular increase in One-way bottles and a substantial one in returnable bottles, can be attributed partly to the promotional efforts in behalf of the One-way beer bottle, and particularly to the can shortage arising from the Korean War.

GLASS CONTAINER SHIPMENTS *Beer bottles*

[fol. 54]

1709



Shipments of soft drink bottles show the periodic peaks characteristic of a returnable bottle market, and the very heavy restocking of starved "floats" in the post-war year of 1947, when sugar rationing became inoperative. Recovery from the 1949 slump has been very rapid and were it not for the threatening can competition, the future for this line of bottles would look very promising. Per capita shipments of beverage bottles in 1952 were 221% of the 1939 level.

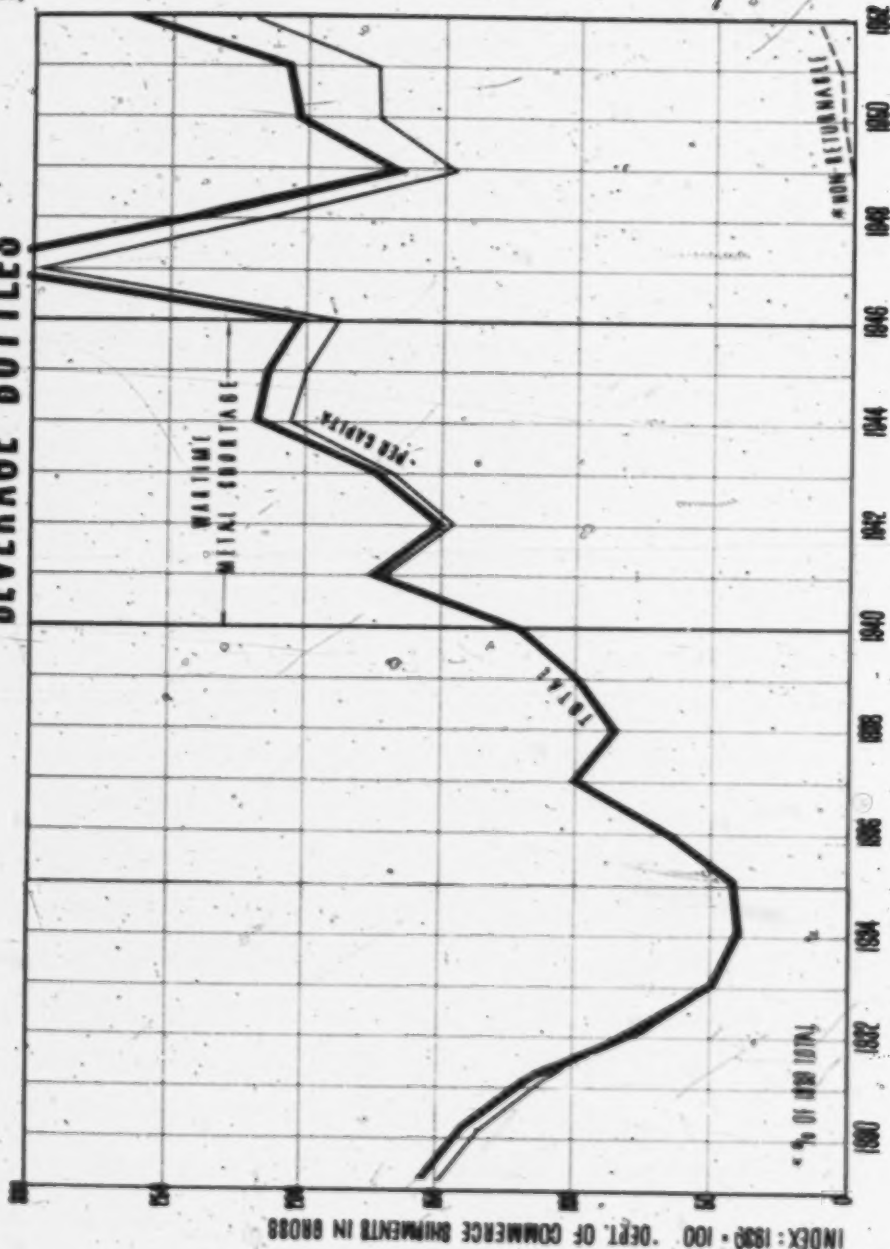
GLASS CONTAINER SHIPMENTS

Carbonated & non-carbonated

BEVERAGE BOTTLES

[Vol. 56]

1711

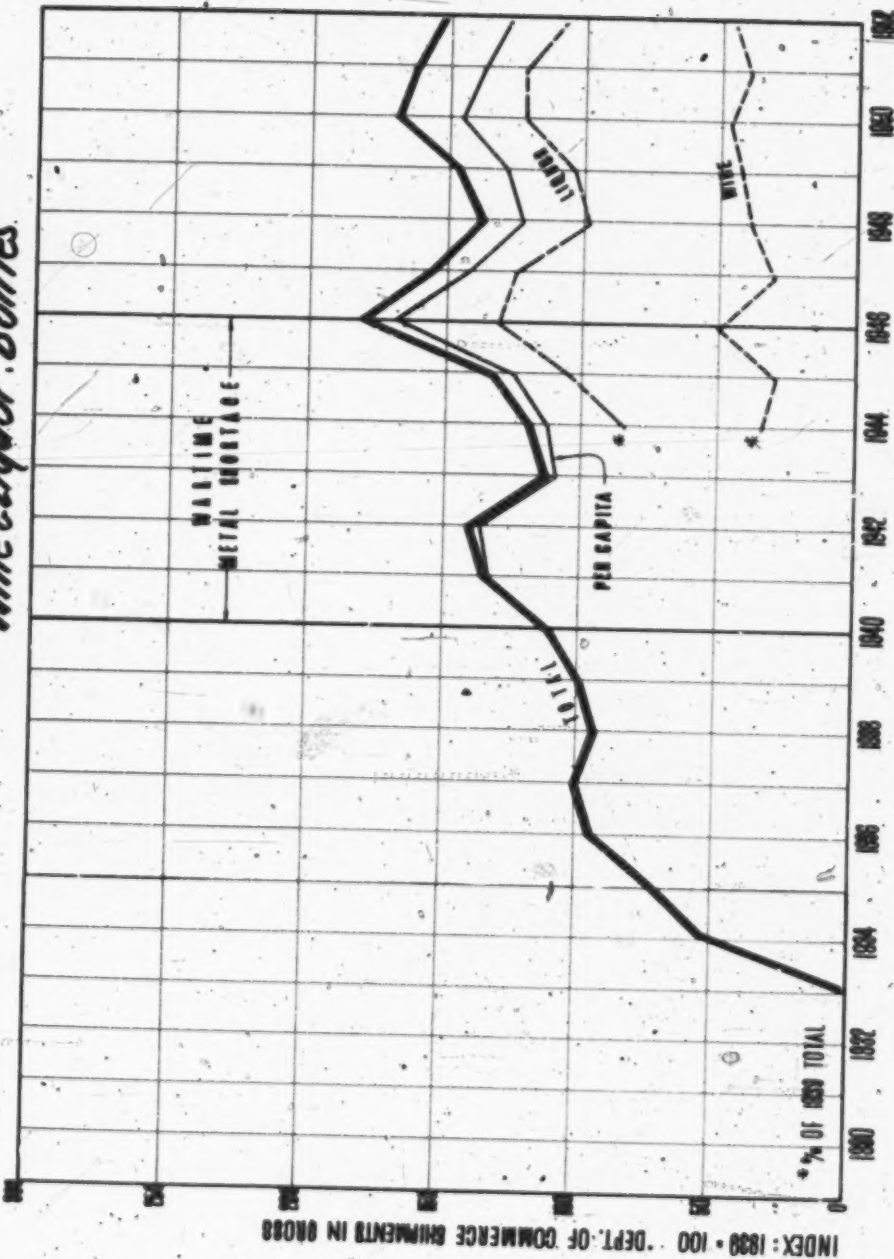


Following its steady rise from the repeal of Prohibition to the early war year of 1942, the curve for wine and liquor bottles levels off appreciably in a curve which barely keeps pace with the population growth. 1952 per capita shipments were only 29% above 1939.

The two elements of this curve, -liquor bottles and wine bottles, - are shown from the year 1944 on. Data for the separate lines were not available prior to that year. As noted on a previous chart, these lines are plotted to show the relative size of the volume of containers used for packaging these two products, so that they will add up to the total of the heavy line on the chart. Consequently, they cannot be properly related to the percentage figures based on 1939 equals 100 at the left-hand margin of the chart.

GLASS CONTAINER SHIPMENTS

Wine & Liquor Bottles



1713

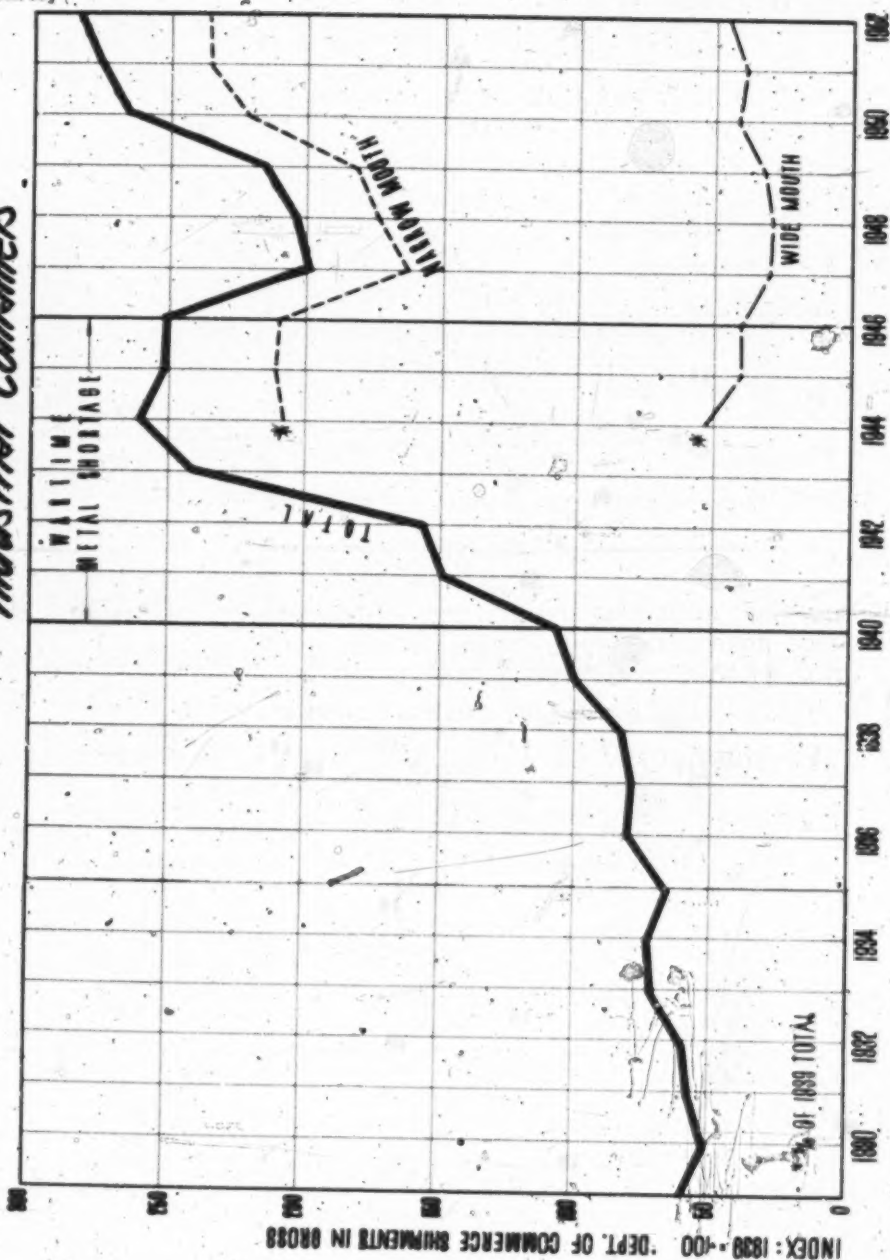
The chemical, household and industrial category shows a post-war usage of glass containers exceeded only by narrow neck foods. Wartime production of ware for these purposes showed a marked increase, and the post-war decline has been considerably less than for other classes of ware. A very gratifying upward trend continued to be manifested in 1952.

GLASS CONTAINER SHIPMENTS

Chemical, Household & Industrial Containers

[fol. 60]

1715



[fol. 61]

From the foregoing charts, it has been evident that the various categories of glass containers reacted differently during and after the war. When glass containers are considered solely from the standpoint of end use, the difference in effect of the war become even more apparent.

This chart shows glass containers by end use. In some instances, it has been necessary to make estimates because of lack of available data, but in all cases figures have been checked with several authorities to secure as much reliability as possible.

The bars at the bottom of the chart include certain classes of product which were hardly affected by the war - toiletries and cosmetics, liquor, milk bottles, and several food products, principally seasonings.

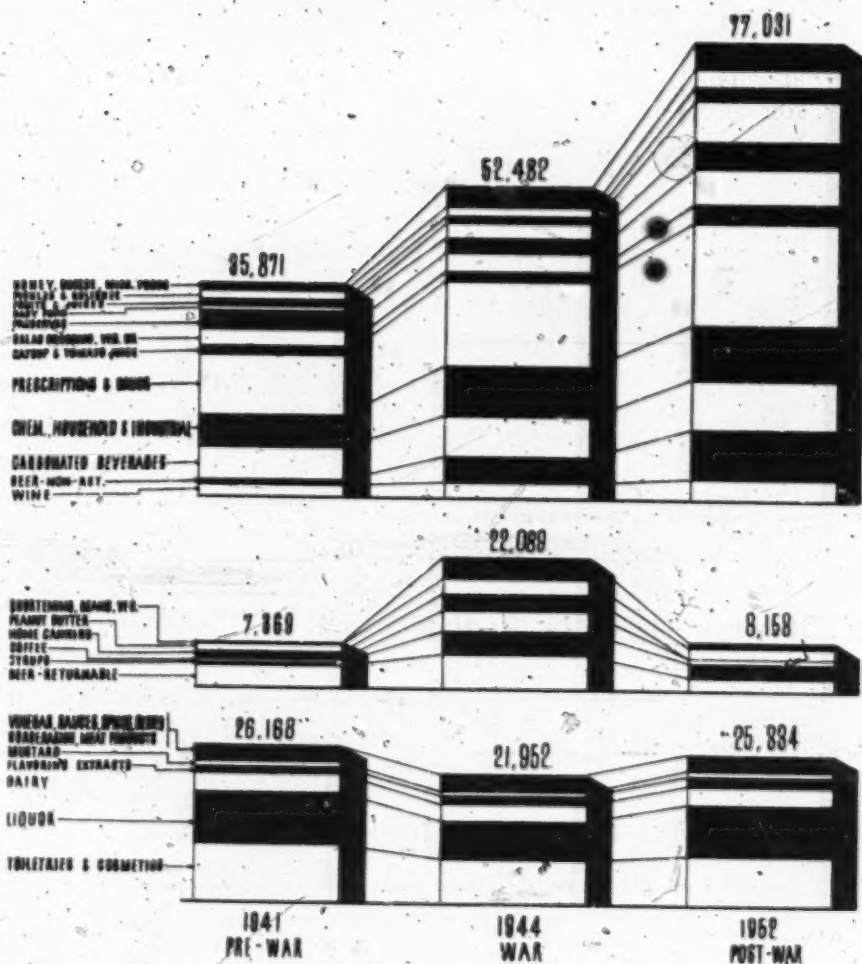
The center bars portray end uses where the stimulation of war measures didn't "take". Volume in these lines have dropped back to pre-war levels.

Products shown in the upper bars increased use of glass during the war, and have increased still more since the war. These are the products that are making the glass container market grow at the present time.

END USES OF GLASS

1717

(Thousands of Gross)



It is evident from some of the changes that have taken place in the glass container industry since, before the war, that changes must have been taking place in competitive industries, also. The following series of charts portray the trend of principal packages competing with glass containers since 1939.

**WHAT HAS
BEEN
HAPPENING
in
COMPETITIVE
INDUSTRIES?**

We now return to our line showing the trend of shipping containers, which we believe to represent the best possible measure of the trend of the general small retail package industry. This line is shown in all of the competitive container charts as a trend reference. On this chart the index is based on 1940 equals 100, as 1940 is the first year for which data on metal can shipments is available.

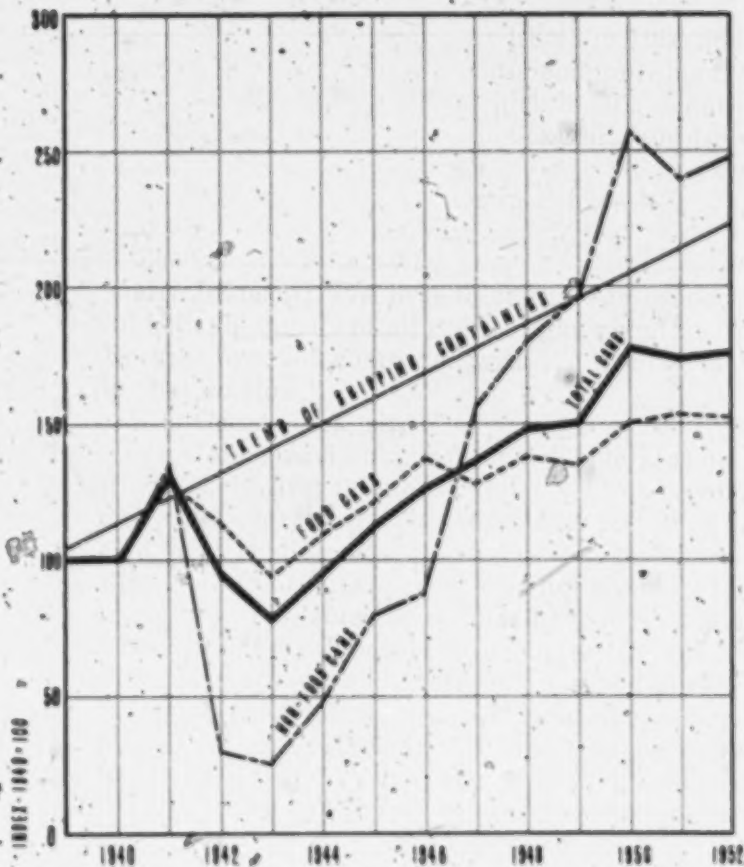
It will be noted that over-all, the can industry has never recovered the position it lost during the war. Food cans in particular are way below the general packaging trend, and are hardly keeping pace with the growth in population. One reason for this is, of course, the invasion of the canned food markets by frozen foods, and the long period of relative prosperity which permits even the lower socio-economic group to buy more fresh fruits and vegetables out of season.

Another reason is that glass has retained some of the markets which cans lost during the war. Reference to chart II shows that glass and cans both moved to new plateaus after the war, one up and one down.

The rapid recovery evidenced by non-food cans reflects principally the rapid growth in the use of beer cans, and also the return of "general line" cans to the market, following war-time restrictions. The great importance of the beer can to the health and welfare of the metal can industry becomes very evident here.

METAL CANS

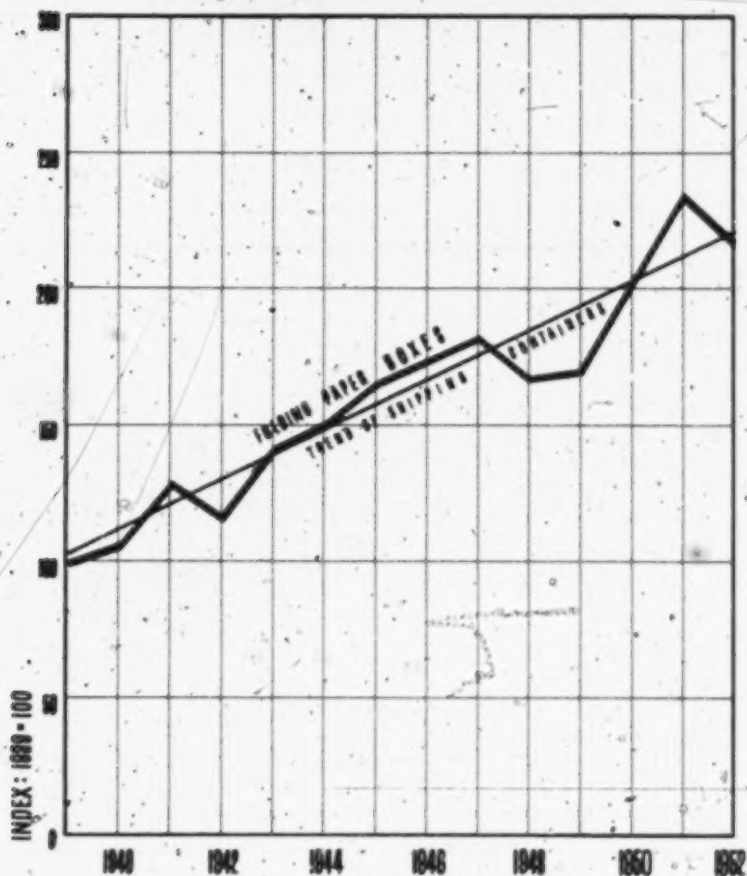
1721



Folding paper boxes, it will be readily seen, clearly follow the general trend of packaging. It will be recalled that this trend represents a rate of growth considerably in excess of the population, and even in excess of the consumer disposable income.

Folding PAPER BOXES

1723

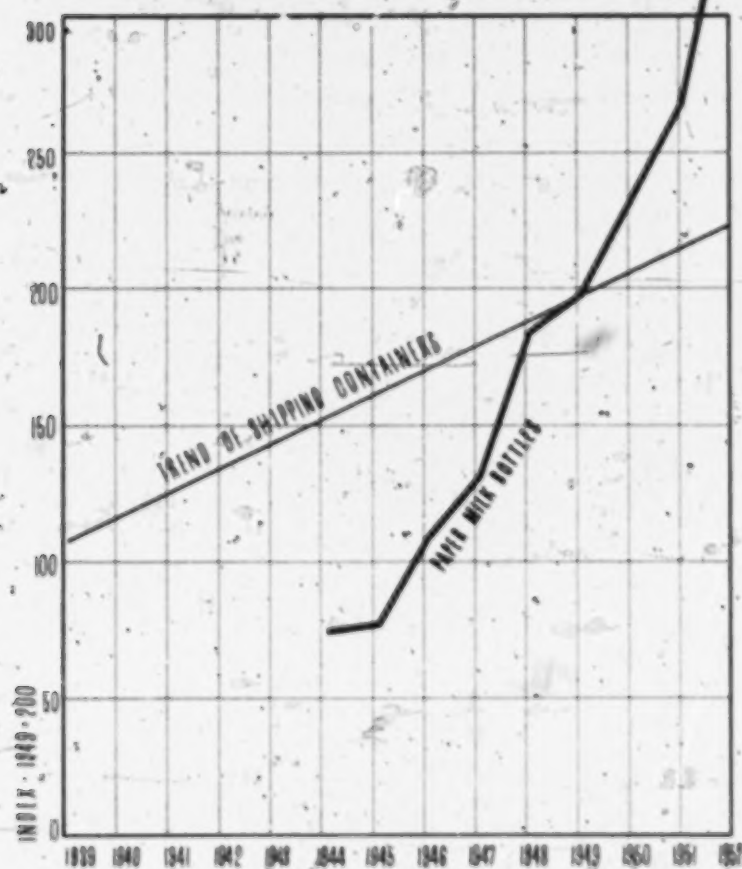


The chart speaks for itself and the glass container industry is only too well aware of the invasions made by this aggressive competitor into a traditionally glass container market.

Continued growth of paper milk bottles will depend largely upon whether they succeed in invading the home delivery market, an end toward which they are vigorously addressing themselves at present:

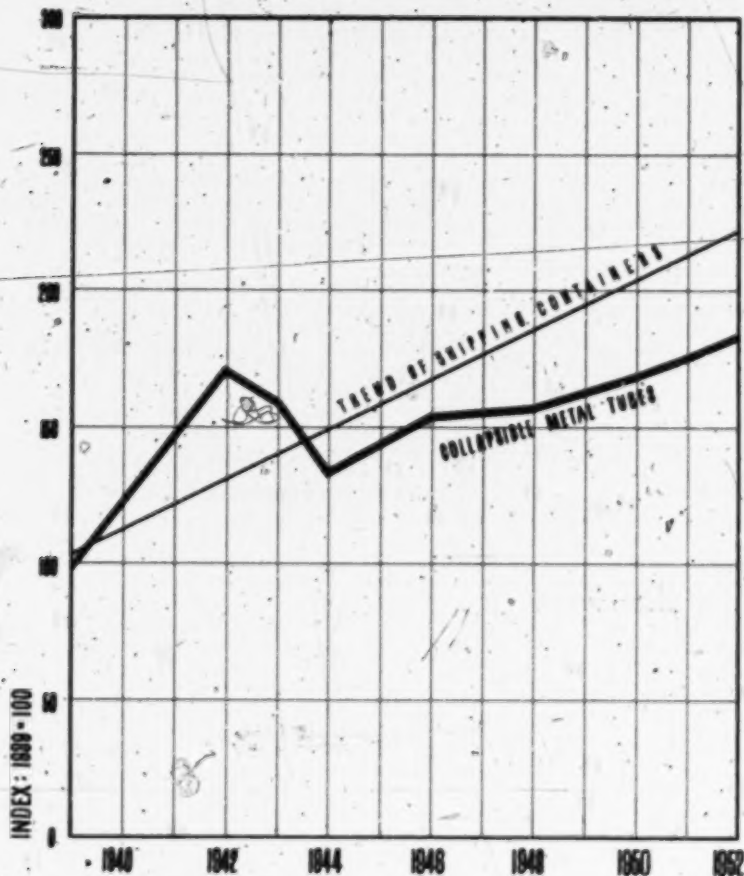
[fol. 70]

PAPER MILK BOTTLES



Collapsible metal tubes, curtailed during the wartime due to metal shortages, have failed to recover their pre-war position and are following a trend that lags considerably behind the growth of the general packaging market. It is presumed that this results from their loss to collapsible tubes made of plastic materials and to other plastic containers.

Collapsible METAL TUBES



Polyethylene is the "glamor boy" of the packaging industry. As a raw material, polyethylene has many uses other than in packaging. The chemical industry predicts that polyethylene will be the first billion pound per year plastic.

It has long been said that plastics would never represent a substantial threat to the glass container industry until a suitable material could be developed from by-products of the petroleum or the coal industries. The cellulose group of plastics has never offered promise of economic ability to compete with glass.

Polyethylene was selling at 49¢ a pound when this survey was undertaken in May. In November, the third cut in polyethylene prices within a year had reduced the price to 41¢ a pound. It is predicted that the eventual price will be in the neighborhood of 30¢ a pound. Careful studies indicate that at this figure, polyethylene squeeze bottles can compete economically with glass, particularly in sizes of 4 oz. capacity and less.

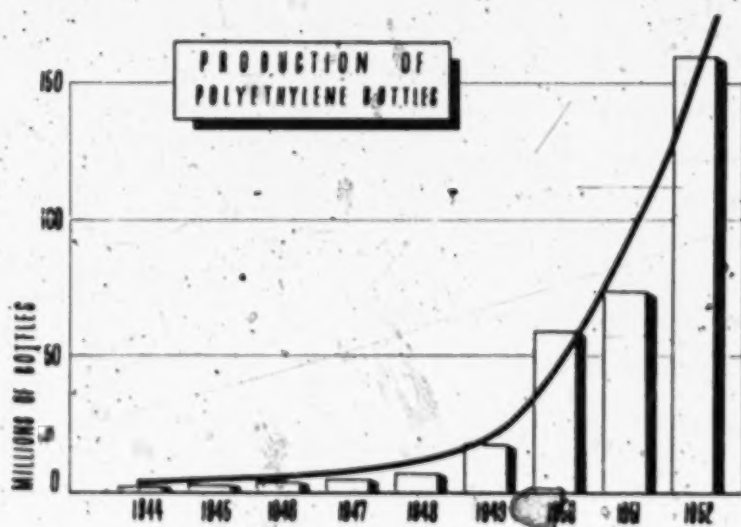
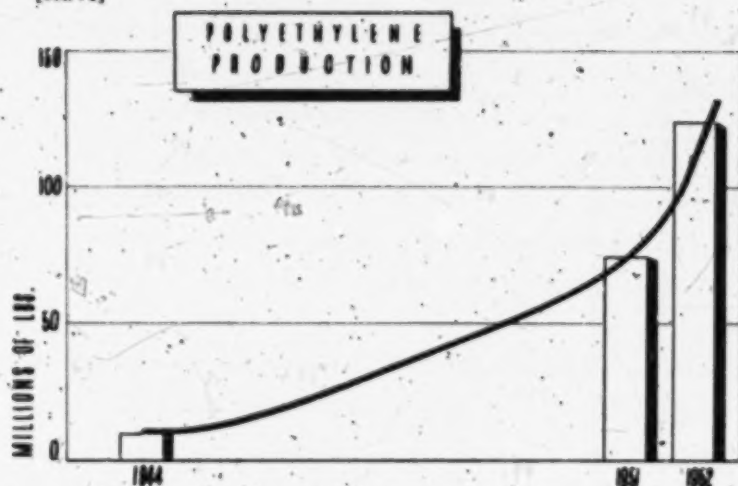
Polyethylene flakes (the raw material for the bottles) were produced at the rate of 125,000,000 pounds per year in 1952. New plants already under construction will bring production to 345,000,000 pounds in 1954 and 420,000,000 pounds in 1955. This will put production ahead of demand next year, for the first time. This should be a strong stimulus to the further development of polyethylene containers, which have heretofore been held back by raw material shortages.

160,000,000 polyethylene bottles were blown in 1952 and it is estimated that four times that number will be turned out in 1954.

A polyethylene bottle weighs about one-fifth as much as the comparable glass bottle and is not susceptible to impact breakage. Polyethylene is an excellent moisture barrier and it is chemically satisfactory to contain most of the products presently sold in glass containers. However, it is permeable to oxygen and carbon dioxide as well to essential oils, and will swell in the presence of certain vegetable and animal oils. Polyethylene bottles cannot withstand sterilizing temperatures. It is expected that as soon as the supply becomes adequate, considerable research will be thrown against this product in an effort to eliminate these objections. Experimental data already available indicate that eventually they will solve these problems.

[fol. 74]

1729

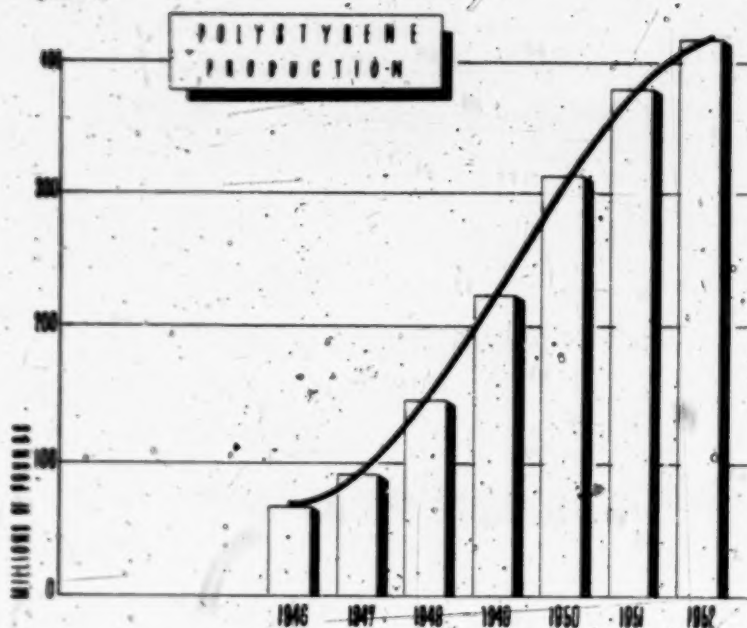


[fol. 75]

Although less spectacular than polyethylene in its long-range possibilities, polystyrene represents an important factor in the future packaging field. It does not give the hope of eventual low cost that polyethylene does, but it has many good qualities. Production of the raw material shows signs of leveling off at about 400 million pounds per year. It has been impossible to determine what portion of this production is going into containers at present, and the product has many other uses.

Polystyrene can be made crystal-clear, colored, or opaque. Polystyrene containers have been quite breakable and subject to crazing and splitting. However, annealing processes recently developed improve its physical qualities considerably. It is rigid (not squeezable). It is subject to "solvent crazing" and also crazing when subjected to direct sunlight or other sources of ultra-violet light. It has good chemical durability but is still incapable of withstanding sterilizing temperature.

Metal foil and plastic film are growing rapidly in the packaging field, although accurate statistics do not seem to be available. Liquid products such as syrup are going into laminated foil and film "unipack" envelopes for individual servings, as are instant coffee, tea, and many dairy products.



FOIL & FILM

Cellophane

1924	500,000	lbs.
1951	300,000,000	lbs.

Vinyl Sheeting

1951	161,581,000	lbs.
------	-------------	------

Metal Foil

1939	19,000,000
1947	50,900,000
1951	102,691,000

New Materials are **POTENT FUTURE THREAT**

ANTICIPATED PRODUCTION

POLYETHYLENE

1952

1956

UP 236%

POLYETHYLENE SQUEEZE BOTTLES

1952

1954

UP 300%

POLYSTYRENE

1952

1956

UP 26%

POLYSTYRENE RIGID BOTTLES

1952

1956

UP 400%

ALUMINUM FOIL

1952

1954

UP 100%

COMPETITION IS BECOMING STRONGER

★ **MORE AGGRESSIVE**

★ **EMPHASIS ON PRODUCT PROMOTION
RATHER THAN BRAND**

★ **NEW MATERIALS, WITH NEW
PROPERTIES AND GLAMOUR OF
NEWNESS**

[fol. 81]

The competitors of glass containers are aggressively advertising their products, and taking advantage of the appeal of newness where they have this.

The Can Manufacturers Institute spent approximately \$1,000,000 a year for consumer advertising from 1944 through 1948. American Can Company is spending at the rate of \$400,000 a year to consumers and \$70,000 a year in trade journals.

Continental Can Company is spending about \$700,000 a year on consumer advertising and \$65,000 on trade papers. Ex-Cell-O Corporation (Purepak Division—paper milk containers) is spending about \$425,000 on consumer advertising and \$35,000 on trade papers. Plax Corporation (polyethylene bottles) is spending at the rate of \$250,000 per year to consumers and \$20,000 in trade journals.

DuPont's Cellophane Division is spending at the rate of \$350,000 per year to consumers and \$25,000 in trade journals, and about \$1,600,000 on newspapers, network radio, and television for "products" and "institutional" advertising in which occur very frequent references to their packaging films and to polyethylene, both films and bottles.

C & C Beverages, plugging their beverages in tin cans and including many unfair but damaging references to glass, were spending \$20,000 per month in newspapers this past summer, and undoubtedly considerably larger sums for a very heavy program of spot radio and television.

Above figures represent expenditures for space and time only. Total advertising budgets are considerably higher than these figures indicate.

COMPETITIVE MATERIALS ARE BEING PROMOTED AGGRESSIVELY

with emphasis on product rather than brand



17087

17087

[fol. 83]

Many competitive products are being promoted even more aggressively with packers and chain stores than with the public.

DuPont has spent hundreds of thousands of dollars promoting cellophane for "impulse buying" among manufacturers of bread, crackers, candies, etc. Each division of this company maintains extensive sales crews to detail the trade.

A review of the advertising of competing industries discloses that their main drive is not for consumer recognition of an individual company's product, but rather to promote their general type of container material in competition with other container materials. And the one container material which all three major competitors (cans, paper, and plastics) center their attack on is glass.

To ignore this challenge is to run the risk of an unprofitable future in a declining market. To meet the challenge and vigorously compete for a larger share of the over-all packaging market offers the hope for a profitable and expanding future for the glass container industry.

[fol. 86]

MAJOR COMPETITION *On the* PACKAGING INDUSTRY

is
PRODUCT *vs* PRODUCT

CANS

*vs*

GLASS

PAPER

*vs*

GLASS

PLASTICS

*vs*

GLASS

**HOW DOES GLASS
COMPARE *With*
COMPETITIVE
CONTAINER
MATERIALS ?**

1744

[fol. 89]

It takes many varied attributes to make a good container material. Each container material excels in certain attributes. Each has certain products for which it is the best adapted container material.

This chart portrays an evaluation of the most important attributes of various types of containers made by Preston Laboratories, Butler, Pennsylvania. Versatility of glass is evidenced by its rating of Good or Excellent in 20 attributes out of 24, whereas its nearest competitor scores 16 out of 23.

However, the two points on which glass rates "Poor" often prove critical in the choice of a container; namely, weight and impact strength.

A study of the chart will disclose the strong and weak points of all principal container materials.

E - EXCELLENT
G - GOOD
F - FAIR
P - POOR

Rating... ATTRIBUTES of GLASS and OTHER MATERIALS for PACKAGING

[Vol. 90]

	GLASS CONTAINERS	METAL CAN (SANITARY)	METAL CAN (GENERAL)	PAPER - MILK CARTONS	PAPER BOX	COLLAPSE METAL TUBES	CELLOPHANE	PLIOFILM	POLYETHYLENE	POLYSTYRENE	METAL FOLIO
COST	G	E	F	P	E	F	E	P	P	P	F
WEIGHT	P	G	G	E	E	G	E	E	E	E	E
STRENGTH (PRESS.)	G	F	F	P	P	F	P	F	P	P	P
STRENGTH (IMPACT)	P	G	G	F	F	E	G	G	E	G	G
STRENGTH (PUNCT.)	E	G	G	P	P	F	P	F	E	G	P
CHEMICAL INERTNESS	E	F		G	P	P	G	-G	G	G	P
TEMP. LIMIT	E (400°F)	G (350°F)	F (300°F)	P	P	F	P	P (170°F)	P (180°F)	P	P
TRANSPARENCY	E	P	P	P	P	P	E	G	P	E	P
ULTRA VIOLET PROTECTION	P to F	E	E	E	E	E	P	P	P	P	E
ULTRA VIOLET DETEIORATION	E	E	E	E	E	E	G	G	G	P	E
PERMEABILITY OF MOISTURE	E	E	E	G	P	E	G	E	E	E	E
PERMEABILITY OF OXYGEN	E	E	E	G	P	E	G	E	P	E	E
PERMEABILITY OF CARBON DIOXIDE	E	E	E	G	P	E	G	E	P	E	E
CLOSURES - EFFECTIVENESS OF SEAL	E	E	G	G	P	E	E	F	E	G	
CLOSURES - EASE OF OPENING	F to E	F to G	G	E	F	E	F	G	E	E	G
CLOSURES - RE-SEAL	E	P	P	P	P	E	P	P	G	G	P
ODOR	E	G	G	P	P	F	E	E	E	F	E
TASTE	E	G	F	P	P	G	E	E	E	E	E
"FEEL"	G	G	G	P	F	G	F	G	E	G	G
APPEARANCE	E	F	G	F	G	G	F	G	G	E	G
CONVEYOR LINE STABILITY	G	E	E	F					P	F	
VACUUM FILLING	E		E						P	E	
INSPECTABILITY - AFTER FILLING	E	P	P	P	P	P	E	E	F	E	P

1745

[fol. 91]

In 1951 "Sales Management" Magazine surveyed the opinion of housewives regarding containers. On this chart are listed, in the order of their importance to the housewife as disclosed by this independent survey, the features they look for in a package. Again we find glass with the best over-all rating, winning Excellent or Good in the five most important categories.

It would appear that the glass container industry can justifiably claim to have the best package for many products and that glass has several important qualities which, if better understood by the public, should prevent invasion of its markets and open many broader markets to it. Glass has the ultimate in a smooth sanitary surface, which other container manufacturers strive mightily to approach while few even come close.

The weaknesses of glass containers (as to weight and impact strength) cry out for increased attention from the technologists.

E - EXCELLENT
G - GOOD
F - FAIR
P - POOR

Rating... FEATURES DESIRED by HOUSEWIVES

[60, 93]

	GLASS CONTAINER	METAL CAN (BIMETAL)	METAL CAN (HYDRA-MET)	PAPER WITH GLASS	PAPER BOX	CELLULOSE BASE & WRAPS	PLASTIC BASE & WRAPS	COLLAPSE METAL TUBES	POLY. FILM	POLY. BOTT. & JARS	POLYSTYRENE BOTTLES & JARS
1. PACKAGE DOES NOT DETERIORATE	E	F to G	P	F	F	P	G	G	G	F to E	G
2. GOOD INNER SURFACE WRAP	E	F to G	P	F	F to G	G	E	G	E	E	E
3. TIGHT SEAL	E	P	P to G	P	P	P	P	G	P	F	E
4. LEAK-PROOF	E	G	G	P	P	P	G	F	G	E	E
5. STABLE, DOESN'T TIP EASILY	G	E	E	F	F to G	P	P		P	F	G
6. "DRIBBLE-PROOF"	F to G	F to E	F to G	F				F		E	G
7. CONVENIENCE IN STORING	G	G	E	E	G	G	G	G	G	G	G
8. EASY TO OPEN	F to E	F to G	G	E	F	F	G	E	G	E	E
9. FITS HANDS	F to E	F	G	E	F to G	G	G	E	E	E	F to G
10. OPENING MAKES CONTENTS EASY TO MEASURE	G	G		F	F to G	P	P		P	E	G
11. EASE OF CARRYING	P	E	E	G	E	E	E	E	E	E	G
12. CAN BE REUSED	E	P	P	P	P	P	P	P	P	G	E

1747

[fol. 93].

Psychological factors, or the "feeling" which people have about glass containers or competitive containers, might involve such things as the aesthetic, - the beauty or social acceptability, the confidence inspired by the ability to see the contents and the feeling that it is safer to store leftovers in glass than in other containers. Whether real or imaginary, such preferences or prejudices could well be strong enough to offset the cost of greater shipping weight.

"Conversely, so long as the danger of glass breakage continues to be exaggerated in the public thought, that factor will be a resistance to the use of glass.

The glass container industry needs to find out the prejudices as well as the preferences of consumers and the trade regarding glass and other types of packages in order to pre-empt this knowledge to increase sales of glass containers.

PSYCHOLOGICAL FACTORS MAY DETERMINE CHOICE OF CONTAINER

**ABSTRACT QUALITIES MAY PROVE MORE
IMPORTANT THAN CONCRETE QUALITIES
IMAGINED ADVANTAGES OFTEN OUT-
WEIGH REAL ADVANTAGES**

**PREJUDICES & PREFERENCES OF THE
MARKET, WHEN LEARNED, MAY BE
USED TO OUR ADVANTAGE**

It is regrettably true that we
tend to forget or overlook the advantages
we enjoy from familiar persons, places
or things. Like the dog in Aesop's Fables
who dropped the real bone from its mouth
in order to grasp the seemingly more
desirable one reflected in the water.
Glass container users may be swayed
by the imaginary advantages of other con-
tainers if not reminded of the good they
are already enjoying.

[fol. 96]

GLASS HAS A PECULIAR PSYCHOLOGICAL PROBLEM

GLASS IS THE OLDEST
GLASS IS FAMILIAR
GLASS IS TAKEN FOR GRANTED

GLASS MUST BE KEPT NEW & GLAMOROUS
by
PUBLICITY
TECHNICAL IMPROVEMENTS

THE PUBLIC MUST BE MADE
GLASS-CONSCIOUS *By*
PROMOTING INTRINSIC
ADVANTAGES *of* GLASS

[fol. 98]

IF GLASS HAD JUST BEEN INVENTED-

EVERYONE WOULD BE EXCITED OVER
THIS AMAZING NEW MATERIAL WITH:

SPARKLING BEAUTY

UNEQUALED CLARITY

CHEMICAL INERTNESS

IMPERMEABILITY

TASTELESSNESS

ABSOLUTE CLEANLINESS

But

GLASS IS TAKEN FOR GRANTED - VULNERABLE
TO ATTACK FROM NEWER, MORE GLAMOROUS MATERIALS

{fol. 100}

**HOW MUCH
BUSINESS
DOES GLASS
STAND *to* LOSE
OR GAIN ?**

There is not a single glass container manufacturer who is not or will not soon be confronted with the active competition or potential competition indicated on these charts. The present glass container volume in these fields is shown in terms of 1952 shipments in gross.

[fol. 102]

COMPETITION FROM MANY SOURCES ON MANY FRONTS

● ACTIVE COMPETITION ○ POTENTIAL COMPETITION

END USE	1956 GLASS SALEMENTS IN ARKTS	METAL CANS	PAPER	PLASTIC CONTAINERS	PLASTIC FILM	METAL FOIL
BABY FOOD	6,800	●				
SALAD DRESSINGS, ETC.	5,400					
PRESERVES	4,500	○		○		
PICKLES	3,530	○			●	
CATSUP	3,144			○		
HONEY	800	●	●			
FLAVORING-EXTRACTS	1,500			○		
PEANUT BUTTER	1,250			○		
SYRUPS	1,250	●		○		●
FRUIT JUICES	1,100	●				
MUSTARD	1,000			○		
COFFEE	900	●				●
VEGETABLE OILS	750	●		○		
OLIVES	735	●				
MEAT & FISH PRODUCTS	870	●				
VINEGAR	550			○		
CHERRIES (maraschino)	500			○		
SPICES	350	●				

Each item on this chart can be substantiated by actual competitive activity disclosed in information from reliable sources. The size of the potential loss in each case is an estimate based on a study of the individual items.

For example, pickles in tin cans are an actuality in Canada; where the packers claim a superior product due to lack of over-cooking during sterilizing. Lithographed cans have long been a popular container for preserves and jams in Canada. The Tea and Coffee Trade Journal carried a recent article to the effect that can manufacturers are perfecting a can for soluble coffee which is being eagerly awaited by the packers.

COMPETITION FROM MANY SOURCES ON MANY FRONTS

● ACTIVE COMPETITION ○ POTENTIAL COMPETITION

END USE	1958 DOLLAR SALES IN QUANT.	METAL CANS	PAPER	PLASTIC CONTAINERS	PLASTIC FILM	METAL FOIL
FRUITS	800	●				
SAUCES	250			○		
BEETS	148	●				
OTHER VEGETABLES	958	●				
HORSE RADISH	200					
CHEESE (processed)	1,800	●		●	●	●
MISC. DRY FOODS						
MISC. LIQUIDS						
MILK	\$ 150	●	●			
DRY MILK			●		●	●
SOFT DRINKS	8,344	●				
BEER	10,466	●				
WINE	3,682	○				
LIQUOR	8,518					
TOILETRIES & COSMETICS	8,211	●	●	●	●	●
PRESCRIPTIONS & DRUGS	17,049	●	●	●	●	●
CHEM. HOUSE & IND.	8,325			●		

1760

[fol. 105]

The potential competition here is self-evident with the possible exception of the jelly field. Toby Jell, a concentrated powdered jelly, has recently been introduced in the New York market, supported by a powerful advertising campaign.

[Vol. 106]

COMPETITION *from* METAL CANS

IN 000'S OF GROSS PER YEAR

1761

PRODUCT	1952 GLASS SHIPMENTS	POSSIBLE LOSS
FOODS		
BEETS	148	50
OTHER VEG. & JUICES	700	250
FRUITS	300	100
FRUIT JUICES	1,400	600
VEGETABLE OILS	750	350
SYRUPS	2,300	700
PICKLES	3,000	200
PRESERVES, JAMS, ETC.	4,500	800
COFFEE	800	500
DAIRY PRODUCTS	3,150	100
BEVERAGES		
CARBONATED BEVERAGES	8,844	2,000
BEER	10,456	4,800
WINE	3,882	600
PRESCRIPTIONS & DRUGS	17,048	500
CHEMICALS, Household & Industrial	8,925	1,500
TOTAL	65,998	13,150

COMPETITION
from
PAPER CONTAINERS
IN 000'S OF GROSS PER YEAR

1762

PRODUCT	1952 GLASS SHIPMENTS	POSSIBLE LOSS
VEGETABLES	850	150 (FROZEN)
FRUITS	300	50 (FROZEN)
PRESERVES, JAMS, JELLIES	4,500	500 (POWDERED)
HONEY	900	200
DAIRY PRODUCTS	3,150	2,000
TOTAL	9,700	2,900

COMPETITION

from

METAL FOIL

IN 000'S OF GROSS PER YEAR

1764

PRODUCT	1952 GLASS SHIPMENTS	POSSIBLE LOSS
FOODS		
SYRUP	2,300	100
COFFEE	900	100
CHEESE	1,300	100
DRY MILK	?	?
TOILETRIES & COSMETICS	8,211	100
PRESCRIPTIONS & DRUGS	17,048	200
TOTAL	28,759	600

Again, envelopes containing individual services of certain products may be made of plastic film and offer competition to glass containers. One of the country's top pickle packers is already merchandising dill pickles, vacuum packed in bags of plastic film.

COMPETITION *from* PLASTIC FILM

IN 000'S OF DOLLARS PER YEAR

1766

PRODUCT	1952 GLASS SHIPMENTS	POSSIBLE LOSS
FOODS		
PICKLES	8,000	100
PROCESSED CHEESE	1,800	300
DRY MILK	?	?
TOILETRIES & COSMETICS	8,211	200
PRESCRIPTIONS & DRUGS	17,048	400
TOTAL	29,559	1,000

The findings of this survey contradict the predictions of certain financial houses that the glass container industry stands to lose as much as forty per cent of its volume to the polyethylene bottle. While the estimates shown here are conservative, they are based upon a knowledge of the glass container industry and a first hand study of the requirements of its users, and the possibilities are large enough to warrant a positive promotion program by the industry.

The first column shows estimates of possible losses based upon the properties of polyethylene and polystyrene as they exist today. The second column assumes that advances in plastic technology will result in greatly improved physical properties as to permeability, chemical resistance to oil, and ability to withstand sterilizing temperatures, which advances will almost certainly be made.

COMPETITION *from* PLASTIC CONTAINERS

1768

IN 000'S OF DOLLARS

PRODUCT	1952 GLASS SHIPMENTS	POSSIBLE LOSS BY 1958 (1)	POSSIBLE LOSS BY 1970 (2)
FOODS			
PRESERVED	4,500	300	1,000
CATSUP	3,144		600
FLAVORING EXTRACTS	1,500	75	450
PEANUT BUTTER	1,850	100	300
SYRUPS	2,300		500
MUSTARD	1,000	75	300
VEG. OILS	750		150
VINEGAR	550	30	150
SAUCES	450	25	100
CHEESE, processed	1,300	180	300
PRESCRIPTION & DRUGS	17,048	2,200	6,000
TOILETRIES & COSMETICS	8,211	2,000	3,500
CHEMICAL, HOUSEHOLD & IND.	9,325	900	1,500
CARBOYS	?	?	?
TOTAL	51,928	6,885	14,300

(1) BASED ON PRESENT PLASTICS TECHNOLOGY

(2) BASED ON PROBABLE ADVANCES IN PLASTIC TECHNOLOGY

Now, let us see what these potential losses in business amount to in aggregate. Even though the individual estimates are believed to be conservative, the total potential loss if the glass container industry should fail to defend these markets is alarming. The indicated 25 million to 33 million gross loss over the period indicated would considerably more than offset general gains attributable to population increase.

SUMMARY
POSSIBLE LOSSES
to
COMPETITIVE CONTAINERS
(in gross per year)

METAL CANS	13,200,000
PAPER	2,900,000
PLASTIC CONTAINERS	6,900,000 / 14,900,000
PLASTIC FILMS	1,000,000
METAL FOIL	600,000
TOTAL	24,600,000 / 32,600,000

[fol. 116]

However, there is another side to the coin, and herein lies a tremendous challenge to the glass container industry. Here again, an effort has been made to keep the estimates on the conservative side. Nevertheless we come up with the imposing total of 70 million gross of potential new business for the glass container industry.

The evaporated milk and baby formula business could be the outgrowth of the G. C. M. I. studies in the aseptic canning field. The business in powdered coffee will depend not only on conversion from ground coffee, but upon glass containers holding the preference of the public and the trade in this field. The same is true of the dried milk and cream business.

In all cases success will depend on continued technological improvement in glass containers, particularly as to weight and breakage - but of greatest importance would be positive efforts through advertising, publicity, and promotion to convince the public of the advantages of glass.

Intelligent, forceful, and persistent means must be used to convert the growing public demand for convenience into increased sales for glass containers, rather than for competitive packages, particularly in the field of single trip carbonated beverage and beer containers.

A potential new market of 70 million gross per year should certainly be worth the effort.

POSSIBLE GAINS

PRODUCT	POTENTIAL	PRESENT PACKAGING
FOODS	(ANNUAL GROSS)	(ANNUAL GROSS)
BABY FOOD	4,400,000	CANS 4,400,000
EVAPORATED MILK & BABY FORMULAS	4,000,000	CANS 16,400,000
SYRUPS	800,000	CANS 2,500,000
FRUIT JUICES	800,000	CANS 5,000,000
FROZEN ORANGE JUICE	700,000	CANS 7,000,000
VEGETABLE OILS	250,000	CANS ?
COFFEE (powdered)	1,200,000	CANS 2,500,000
TEA (powdered)	200,000	PAPER ?
RIPE OLIVES	800,000	CANS 800,000
FRUITS	2,500,000	CANS 15,650,000
BEETS	500,000	CANS 1,500,000
OTHER VEGETABLES	1,200,000	CANS 28,800,000
DRIED MILK & CREAM	5,000,000	CANS · PAPER · GLASS
BEVERAGES		
CARBONATED BEVERAGES	15,000,000	RETURNABLE GLASS
BEER	80,000,000	RETURNABLE GLASS
MISCELLANEOUS		
LOW PRESSURE AEROSOLS	500,000	CANS 700,000
MOTOR OILS	500,000	CANS 5,000,000
OTHER AUTOMOTIVE SUPPLIES	500,000	CANS ?
CHEMICALS, HOUSEHOLD & IND.	2,000,000	CANS · PAPER · NEW PRODUCTS
TOTAL	70,350,000	

CONCLUSIONS

In terms of our problem, as stated in the Foreward, it seems to me that the conclusions of our study, shown in this chart and the one that follows, indicate that:

- (1) Our competition is strong - not to be ignored.
- (2) We need to raise the value of our product in the eyes of the public.
- (3) To do so would protect present markets and open up broad new markets, and
- (4) The prize would be worth the effort.

To raise the value of the glass container in the opinion not only of those who empty it, - but also of those who buy, fill, distribute and sell it we must:

- (1) Actually continue to improve it physically, - to lighten it and strengthen it, and increase its utility and beauty and convenience.
- (2) Reduce the over-all cost of the finished glass package to everyone involved, and
- (3) Explain it, sell its advantages and strengthen preferences, all along the line.

To do this requires stepped up:

Market Research

Technical Research

Design Research

Glass handling engineering, and

Effective educational advertising and publicity.

CONCLUSIONS

1. THE PACKAGING MARKET IS EXPANDING
2. GLASS CONTAINER VOLUME, ABNORMALLY BOOSTED BY WAR, SHOWS SIGNS OF LEVELING OFF
3. COMPETITIVE CONTAINERS ARE ALL GROWING, NEW MATERIALS AT RAPID PACE
4. COMPETITION IS AGGRESSIVE, ACTIVELY PROMOTED, HAS THE GLAMOR OF NEWNESS
5. GLASS IS TAKEN FOR GRANTED, VULNERABLE TO ATTACK FROM NEW MATERIALS
6. THE INDUSTRY DOES NOT ENJOY ESTEEM OF OPINION LEADERS TO WHICH IT IS ENTITLED

7. GLASS STANDS TO LOSE UP TO **28%** OF
PRESENT VOLUME, OR GAIN **62%**

8. GLASS HAS OPPORTUNITY NOW, BEFORE NEW
MATERIALS BECOME ENTRENCHED,
TO PROTECT PRESENT FRANCHISE AND
SECURE NEW MARKETS

9. TO MAINTAIN POSITION, GLASS CONTAINER
INDUSTRY MUST...

a. RESEARCH THE MARKET, STUDY ITS PSYCHOLOGY

b. KEEP UP-TO-DATE, IN DESIGN AND TECHNICAL IMPROVEMENTS

c. ERASE PUBLIC MISCONCEPTIONS ABOUT
INDUSTRY & ITS PRODUCTS

d. FIGHT AGGRESSIVELY, WHERE COMPETITION
IS KEEN AND GLASS IS "RIGHT"

A P P E N D I X

Containing data on which
charts are based

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[fol. 123]

1778

SHIPMENTS OF
GLASS CONTAINERS

56

SHIPMENTS OF GLASS CONTAINERS

1779

Year	<u>ALL CLASSES</u>		<u>NARROW NECK FOOD CONTAINERS</u>		<u>WIDE MOUTH FOOD CONTAINERS</u>	
	Shipments	Index	Shipments	Index	Shipments	Index
1929	33,500	68	2,800	76	7,086	68
1930	32,000	65	2,740	74	7,300	70
1931	31,300	64	2,500	68	6,773	65
1932	27,100	55	2,100	57	6,094	58
1933	33,000	67	2,250	61	6,947	66
1934	35,000	71	2,820	76	8,172	78
1935	37,500	76	3,100	84	8,204	78
1936	45,575	93	3,491	94	9,571	92
1937	50,243	102	3,573	97	9,834	94
1938	43,528	88	3,172	86	9,166	88
1939	49,366	100	3,695	100	10,451	100
1940	52,494	106	3,800	103	10,990	105
1941	69,408	141	4,826	130	14,222	136
1942	79,685	162	5,552	150	19,384	185
1943	95,518	193	7,240	196	26,641	255
1944	96,471	195	7,577	205	26,445	253
1945	104,005	210	8,886	240	29,335	281
1946	113,544	230	10,479	284	34,675	332
1947	105,678	214	10,679	288	26,091	250
1948	93,961	190	9,852	267	24,325	233
1949	87,449	177	8,835	239	23,331	223
1950	105,255	214	11,060	300	28,719	275
1951	111,675	227	11,528	313	27,448	263
1952	111,425	226	11,917	324	30,774	294

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index - 1939 equals 100

SHIPMENTS OF GLASS CONTAINERS**1780**

Year	<u>DAIRY PRODUCTS</u>		<u>HOME CANNING JARS</u>		<u>CHEMICAL HOUSEHOLD & INDUSTRIAL CONTAINERS</u>	
	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>
1929	2,560	107	1,260	132	1,933	59
1930	2,311	96	960	100	1,677	51
1931	2,203	92	2,301	240	1,872	57
1932	2,116	88	1,517	158	1,953	59
1933	1,874	78	1,116	117	2,343	71
1934	1,871	78	958	100	2,383	72
1935	2,067	86	1,307	142	2,174	66
1936	2,466	103	866	93	2,625	80
1937	2,581	108	1,278	133	2,604	79
1938	2,201	92	927	97	2,738	83
1939	2,394	100	958	100	3,289	100
1940	2,456	102	722	75	3,522	107
1941	3,248	137	1,290	135	4,915	149
1942	3,316	139	2,019	210	5,175	157
1943	3,126	130	4,358	455	7,924	241
1944	2,966	124	2,890	302	8,589	261
1945	3,608	151	2,458	257	8,299	252
1946	3,897	163	2,593	271	8,269	251
1947	3,891	163	2,175	227	6,389	199
1948	3,247	136	2,117	221	6,699	204
1949	3,311	138	1,763	184	7,063	215
1950	3,695	154	1,055	110	8,739	265
1951	3,517	147	882	92	9,099	276
1952	3,150	132	N. A.	-	9,325	283

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index - 1939 equals 100

SHIPMENTS OF GLASS CONTAINERS

1781

TOILETRY AND COSMETIC CONTAINERS
AND
MEDICINAL AND DRUG CONTAINERS

Year	<u>TOTAL</u>		<u>TOILETRY & COSMETICS</u>		<u>MEDICINAL AND DRUGS</u>	
	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>
1929	13,277	88				
1930	12,534	83				
1931	12,149	80				
1932	10,790	71				
1933	12,475	82				
1934	12,085	80				
1935	12,420	82				
1936	14,304	95				
1937	14,991	99				
1938	13,067	86				
1939	15,225	100				
1940	15,447	101				
1941	19,966	131				
1942	19,983	124				
1943	23,360	153				
1944	21,642	142	7,382	49 *	14,260	93 *
1945	23,629	155	8,143	53	15,486	102
1946	25,963	170	8,642	56	17,321	104
1947	20,766	136	5,243	41	14,523	95
1948	21,310	140	6,471	42	14,840	98
1949	21,165	139	6,603	43	14,562	96
1950	25,707	169	7,572	50	18,134	119
1951	25,419	167	7,844	51	17,575	116
1952	25,259	166	8,211	54	17,048	102

* Indexes for components are expressed as percentages of 1939 total shipments.

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index - 1939 equals 100

SHIPMENTS OF GLASS CONTAINERS

1782

TOILETRY AND COSMETIC CONTAINERS

Year	TOTAL		NARROW NECK		WIDE MOUTH	
	Shipments	Index	Shipments	Index	Shipments	Index
1929						
1930						
1931						
1932						
1933						
1934						
1935						
1936						
1937						
1938						
1939	4,872*	100				
1940						
1941						
1942						
1943						
1944	7,382	151	5,423	111 #	1,959	40 #
1945	8,143	167	6,353	130	1,790	37
1946	8,642	177	6,986	143	1,656	34
1947	6,243	128	4,870	100	1,373	28
1948	6,451	132	4,931	101	1,540	31
1949	6,603	135	5,172	106	1,431	29
1950	7,572	155	5,977	122	1,595	33
1951	7,844	161	6,241	128	1,603	33
1952	8,211	168	6,597	135	1,614	33

* 1939 shipments of Toiletry and Cosmetic Containers are estimated by splitting total shipments in 1939 by average share of total during 1944-52 period.

Indexes for components are expressed as percentages of 1939 total shipments.

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index - 1939 equals 100.

SHIPMENTS OF GLASS CONTAINERS

1783

MEDICINAL AND DRUG CONTAINERS

Year	<u>TOTAL</u>		<u>NARROW NECK</u>		<u>WIDE MOUTH</u>	
	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>
1929						
1930						
1931						
1932						
1933						
1934						
1935						
1936						
1937						
1938						
1939	10,353*	100				
1940						
1941						
1942						
1943						
1944	14,260	138	11,347	110#	2,913	28#
1945	15,486	149	12,331	119	3,155	30
1946	17,321	167	13,864	134	3,457	33
1947	14,523	140	11,422	110	3,101	30
1948	14,840	143	11,822	114	3,018	29
1949	14,562	140	11,659	112	2,903	28
1950	18,134	175	14,685	142	3,449	33
1951	17,575	169	13,726	132	3,849	37
1952	17,048	164	13,073	126	3,975	38

* 1939 shipments of Medicinal and Drug Containers are estimated by splitting total shipments in 1939 by average share of total during 1944-52 period.

#Indexes for components are expressed as percentages of 1939 total shipments.

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index - 1939 equals 100

SHIPMENTS OF GLASS CONTAINERS**1784**BEER BOTTLES

Year	<u>TOTAL</u>		<u>RETURNABLE</u>		<u>NON- RETURNABLE</u>	
	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u> *	<u>Shipments</u>	<u>Index</u> *
1929						
1930						
1931						
1932						
1933	4,493	192	4,493	192		
1934	1,323	57	1,323	57		
1935	1,346	58	1,346	58		
1936	2,674	114	2,674	114		
1937	4,313	185	4,313	185		
1938	2,136	91	2,136	91		
1939	2,339	100	2,107	90	231	10
1940	2,942	126	2,608	112	334	14
1941	4,636	198	3,676	157	960	41
1942	9,277	397	6,181	265	3,096	132
1943	8,319	356	6,562	281	1,757	75
1944	10,080	431	N. A.		N. A.	
1945	10,359	443	5,940	254	4,419	189
1946	6,782	290	5,904	252	878	38
1947	12,991	555	9,952	425	3,039	130
1948	7,665	328	4,100	176	3,565	154
1949	4,996	214	1,995	85	3,001	129
1950	6,366	272	3,150	135	3,211	137
1951	14,340	613	4,524	193	9,816	420
1952	10,456	447	2,258	97	8,198	350

*Returnable and non-returnable bottle shipment indexes are expressed as percent of total beer-bottle shipments in 1939.

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index : 1939 equals 100

SHIPMENTS OF GLASS CONTAINERS

1785

BEVERAGE BOTTLES

Year	<u>TOTAL</u>		<u>RETURNABLE</u>		<u>NON-RETURNABLE</u>	
	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>
1929	4,829	154				
1930	4,434	141				
1931	3,692	117				
1932	2,395	76				
1933	1,531	49				
1934	1,254	40				
1935	1,327	42				
1936	2,111	67				
1937	3,133	101				
1938	2,745	87		100		100
1939	3,148	100				
1940	3,827	122				
1941	5,548	176				
1942	4,795	152				
1943	5,565	176				
1944	6,906	219	6,906	219		
1945	6,806	216	6,806	216		
1946	6,456	205	6,456	205		
1947	10,376	330	10,376	330		
1948	7,805	248	7,792	247	13	
1949	5,325	169	5,274	167	51	2
1950	6,459	205	6,291	199	168	5
1951	6,572	209	6,398	203	180	6
1952	8,311	265	7,897	251	442	24

*Index for both returnable and non-returnable bottles are based on 1939 shipments for returnable bottles.

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index - 1939 equals 100

SHIPMENTS OF GLASS CONTAINERS

1786

WINE AND LIQUOR BOTTLES

Year	<u>TOTAL</u>		<u>WINE</u>		<u>LIQUOR</u>	
	Shipments	Index	Shipments	Index	Shipments	Index
1929						
1930						
1931						
1932						
1933						
1934	4,150	53				
1935	5,663	72				
1936	7,447	95				
1937	7,936	101				
1938	7,376	94				
1939	7,867	100				
1940	8,788	112				
1941	10,757	137				
1942	11,184	142				
1943	8,984	114				
1944	9,412	120	2,786	35.5	6,626	84.5
1945	10,625	135	2,364	30	8,261	105
1946	14,430	183	4,017	51	10,413	132
1947	12,320	157	2,418	31	9,902	126
1948	10,942	139	3,182	40	7,760	99
1949	11,662	148	3,421	43.5	8,241	104.5
1950	13,455	171	3,746	48	9,709	123
1951	12,860	164	3,219	41	9,645	123
1952	12,200	155	3,682	47	8,518	108

#Indexes for components are expressed as percentages of 1939 total shipments.

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index - 1939 equals 100

SHIPMENTS OF GLASS CONTAINERS

1787

CHEMICAL, HOUSEHOLD AND INDUSTRIAL CONTAINERS

Year	<u>TOTAL</u>		<u>NARROW NECK</u>		<u>WIDE MOUTH</u>	
	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>
1929	1,933	59				
1930	1,677	51				
1931	1,872	57				
1932	1,953	59				
1933	2,343	71				
1934	2,383	72				
1935	2,174	66				
1936	2,625	80				
1937	2,604	79				
1938	2,738	83				
1939	3,289	100				
1940	3,522	107				
1941	4,915	149				
1942	5,175	157				
1943	7,924	241				
1944	8,638	262	6,850	208*	1,788	54
1945	8,299	252	6,962	211	1,337	41
1946	8,269	251	6,937	210	1,332	41
1947	6,389	194	5,367	163	1,023	31
1948	6,699	204	5,729	174	976	30
1949	7,063	215	5,990	182	1,073	33
1950	8,739	265	7,321	222	1,418	43
1951	9,099	276	7,788	236	1,310	40
1952	9,325	283	7,788	236	1,537	47

* Indexes for components are expressed as percentages of 1939 total shipments.

Source: U. S. Department of Commerce

Notes: Shipments in thousands of gross
Index - 1939 equals 100

[fol. 133]

1788

SHIPMENTS OF
COMPETITIVE CONTAINERS

SHIPMENTS OF COMPETITIVE MATERIALS

1789

CORRUGATED
SHIPPING
CONTAINERSFOLDING
PAPER
BOXESPAPER
MILK
BOTTLES

<u>Year</u>	<u>Shipments</u>	<u>Index</u>	<u>Index Current \$</u>	<u>Index 1939 \$</u>	<u>Shipments</u>	<u>Index</u>
1929						
1930						
1931						
1932						
1933						
1934						
1935	1,976					
1936	2,271					
1937	2,503					
1938	2,246					
1939	2,883	100	100.0	100.0		
1940	2,979	104	107	106		
1941	4,309	149	148	135		
1942	3,549	123	150	117		
1943	4,056	140	190	143		
1944	4,059	140	202	151	66,596	76
1945	4,043	140	226	166	68,452	78
1946	4,914	170	274	175	97,166	111
1947	5,097	176	360	184	115,188	132
1948	5,195	180	359	168	162,333	185
1949	5,115	176	344	172	175,000	200
1950	6,547	226	425	203	N. A.	
1951	6,384	220	550	236	259,062	296
1952	6,204	214	508	218	311,000(ex)	356

Notes: Shipments - Corrugated Shipping Containers: millions square feet surface area, monthly average.

- Folding Paper Boxes: index of value of shipments

- Paper Milk Bottles: tons

Index - 1939 equals 100 Index of Paper Box Shipments shown in current dollars and 1939 dollars.

Source: U. S. Dept of Commerce.

SHIPMENTS OF COMPETITIVE MATERIALS

1790

METAL CANS

<u>Year</u>	<u>TOTAL</u>		<u>FOOD</u>		<u>NON-FOOD</u>	
	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>	<u>Shipments</u>	<u>Index</u>
1929						
1930						
1931						
1932						
1933						
1934						
1935						
1936						
1937						
1938						
1939						
1940	182,641	100	139,713	100	42,928	100
1941	237,057	130	178,478	128	58,579	136
1942	170,258	935	157,494	113	12,764	29.7
1943	140,372	77	129,709	93	10,663	24.8
1944	172,633	95	152,253	109	20,380	47.5
1945	203,465	111	169,190	121	34,275	79.7
1946	229,960	126	192,113	139	37,847	88.2
1947	246,343	135	178,883	128	67,460	157
1948	270,429	148	193,124	138	77,305	181
1949	273,077	150	188,456	135	84,621	197
1950	324,444	178	212,579	152	111,870	260
1951	319,046	174	213,216	153	103,830	241
1952	320,136	176	212,906	152	107,230	250

Source: U. S. Department of Commerce

Shipments: Short Tons of steel used for cans (monthly average)

[fol. 136]

SHIPMENTS OF COMPETITIVE MATERIALS

1791

COLLAPSIBLE
METAL
TUBES

POLYETHYLENE

POLYSTYRENE

<u>Year</u>	<u>Shipments (Millions Gross)</u>	<u>Index</u>	<u>Production (Pounds)</u>	<u>Production (Pounds)</u>
1929				
1930				
1931				
1932				
1933				
1934				
1935				
1936				
1937				
1938				
1939	3.5	100		
1940				
1941		150		
1942	6.0	175		
1943		160		
1944	4.7	135	9,000,000	
1945		145		
1946		155		
1947	5.5	157		66,768,000
1948		160		94,982,000
				145,296,000
1949		165		
1950		170		222,492,000
1951		177	75,000,000	311,880,000
1952	6.5	185	125,000,000	375,127,000
				412,974,000

Source: Estimates
based on fragmentary
data from Collapsible
Tube Manufacturers
Association

Source: 1944 and
1951 - National
Production
Authority
1952 - Industry
estimate

Source: Tariff
Commission

A PLAN
of
ACTION
for the
GLASS
CONTAINER
INDUSTRY

[fol. 138]

1793

**A PLAN OF ACTION
for the
GLASS CONTAINER INDUSTRY**

As presented by Richard L. Cheney to members
of Glass Container Manufacturers Institute, Inc.
at the Semi-annual meeting December 1, 1953

Copy No. 183 for the confidential use of:

CHARTS shown at semi-annual meeting are reproduced on right-hand pages of this report, numbered for reference.

COMMENTS made by R. L. Cheney are condensed on left-hand pages, facing charts to which they correspond.

1794

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WHAT
WE CAN
LEARN
from
OTHER
INDUSTRIES

In an effort to benefit by the experience of other industries, we have called upon and studied in detail the plans of six important trade associations and have studied the marketing plans of several others. The six are mentioned on these charts with an indication of the lessons to be learned from each.

AMERICAN GAS ASSOCIATION

1797

PROMOTION BUDGET \$2,000,000. PER YEAR

Old Product kept New by...

AGGRESSIVE, CONSISTANT PROMOTION

CONSISTENT IMPROVEMENT OF STANDARDS **[LP]**

Weakness... GAS ELECTRIC MEMBERS

AMERICAN INSTITUTE of LAUNDERING

Periodic Market surveys...

AS BASIS FOR ADVERTISING

TO DIRECT TECHNICAL RESEARCH

AMERICAN MEAT INSTITUTE

PROMOTION BUDGET \$2,500,000 PER YEAR

Market research used as...

BASIS FOR PLANNING

BIENNIAL CHECKS ON PROGRESS

CONSISTENT, FORCEFUL PROMOTION

AMERICAN MEAT INSTITUTE RESEARCH FOUNDATION

1798

Of most direct benefit to the Glass Container Industry were the study of the plans of the American Meat Institute and the Pennsylvania Grade Crude Oil Association. The former is particularly noteworthy because of its intelligent use of market research, and its consistent forceful advertising program guided thereby. A preliminary consumer survey by Elmo Roper disclosed their basic problem: almost everybody liked meat, however many people had a guilt complex about eating meat, as the food faddists had sold them on a bill of goods that somehow eating meat was harmful. It was not difficult to obtain much sound medical testimony to the effect that this general belief was in error. It is very impressive to see the gradual change in consumer attitude depicted in Mr. Roper's surveys made in 1947, 1949, 1951, and 1953. By 1953 meat had regained its old-time number one position in the favor of the American public as a source of protein. Theirs has been a most effective program.

From Pennsylvania Grade Crude Oil Association we could learn two very important lessons. First, is the value of consistency, and "keeping at it". Although their budget has varied little from year to year and has never been much over \$250,000 per year, it has continued uninterrupted for 30 years, and the deep impression made upon the public consciousness is known to all. A second thing they have to show us is a tight economical administration which drains off a minimum of funds for "trills" and applies the major part to the productive advertising.

ASSOCIATION *of* AMERICAN RAILROADS

INFORMATION CENTER

SHIPPER ADVISORY BOARD

Weakness... NO PROMOTION EFFORT

WESTERN BEET SUGAR PRODUCERS, INC.

BUDGET \$1,000,000 PER YEAR

Program based on market research

NO EXAGGERATED CLAIMS... TELL THE FACTS

Weakness... INTRA-INDUSTRY VIEWPOINTS

PENNSYLVANIA CRUDE OIL ASSOCIATION

BUDGET \$250,000 PER YEAR

Consistent program for 30 years

— TIGHT ECONOMICAL ADMINISTRATION...

A PATTERN FOR GCMI

We will now outline the framework of a plan of action for the glass container industry designed to meet the requirements summarized in the conclusions of the industry survey just reviewed.

The plan includes fact-finding (market research) to insure a solid foundation. It then proceeds to suggest possible industry-wide activities to supplement the good work already being done by individual companies directed toward the continued improvement of the physical properties of glass containers (technical research and design research); and increased efficiency in the packaging operation (glass handling research).

Greatest emphasis is given to advertising and publicity since consumer and user understanding of and preference for glass containers is the final determining factor as to the size of future glass container markets.

With the exception of the market research phase, - which we can define quite clearly now, the other phases of this recommended plan should be recognized as nothing more than tentative outlines for the purpose of determining the approximate cost of an effective effort. The details, if the plan were adopted, would be modified or completely changed according to the findings of the market research and the recommendations of the expert individuals or agencies who would be engaged to carry them out.

A PLAN OF ACTION *for the* GLASS CONTAINER INDUSTRY

- ☆ MARKET RESEARCH
- ☆ TECHNICAL RESEARCH
- ☆ GLASS HANDLING RESEARCH
- ☆ DESIGN RESEARCH
- ☆ ADVERTISING & PUBLICITY

MARKET RESEARCH

These facts are self-evident.

We need only recall the example of the American Meat Institute to appreciate the value of market research in determining the most effective approach to marketing problems, and the danger of missing the mark completely without such guidance.

MARKET RESEARCH

is essential in modern marketing

BECAUSE ...

- * CONTAINER CHOICE RESTS ULTIMATELY
WITH CONSUMERS AND RETAILERS
- * PSYCHOLOGICAL FACTORS AND PREJUDICE
INFLUENCE CHOICE
- * MARKETS ARE CONSTANTLY CHANGING, IN
CHARACTER, HABITS, AND THINKING

Here is the basic information we would develop and keep up to date through market research. Such information, it will be seen, would be fully as essential to guide technical and design research as it would promotional effort. It would tell us what we need to know to make our product more desirable and more functional for the public.

Properly conducted, it can be "imaginative research", discovering potential new markets for glass containers. Thus it would keep industry thinking dynamic.

MARKET RESEARCH

provides basic information

1. FIND OUT PREFERENCES AND PREJUDICES ON CONTAINERS
2. DETERMINE RELATIVE ADVANTAGES OF GLASS AND COMPETING CONTAINERS IN MINDS OF MARKET
3. UNCOVER MISCONCEPTIONS ABOUT GLASS
4. STUDY HABITS OF USE AFFECTING PREFERENCE AND DESIGN
5. DISCOVER POTENTIAL NEW MARKETS WHERE DISSATISFACTION EXISTS
6. KEEP ABREAST OF CHANGING TRENDS

Market Research program outlined here is scientifically designed to give the necessary answers as to public and group opinions within an accuracy of approximately 5%. This, while not adequate for predicting an election, would be perfectly sound for our purposes.

The plan would be to conduct the first bi-annual study before launching any promotional effort to insure that the effort will be guided in the proper direction. This study would then be repeated every two years to measure the effectiveness of the industry program and modify the approach as needed. These re-surveys would also uncover new opportunities and new threats to the industry in time to take advantage of this knowledge.

Spot surveys would be of the nature of the recent survey of the California Baby Food Market, as the need for these special studies appeared.

The continuous data collection would be carried on by a girl in the GCMI office specially trained in statistics and market research, so as to keep the market survey you have just reviewed up to date, with periodic bulletins to the industry covering developments of interest.

MARKET RESEARCH PROGRAM

BI-ANNUAL MARKET STUDIES

10,000 CONSUMER FAMILIES

2,000 RETAILERS

100 WHOLESALERS AND CHAINS

50 PACKERS

100 OPINION INFLUENCING AGENCIES

SPOT SURVEYS

ON SPECIFIC PROBLEMS, WHEN AND
AS NEEDED

CONTINUOUS DATA COLLECTION

GOVERNMENT STATISTICS
STATISTICS ON COMPETITION
CLIPPINGS
REPORTS ON NEW PRODUCTS

The figure for the bi-annual market study shown in this budget indicates the yearly cost. It represents an estimate of \$70,000 for each such study, conducted every other year. This may seem to be a low figure, but we have every reason to believe that we can obtain such a study, complete with the highest type of analytical interpretation of the meaning of the findings to the industry.

MARKET RESEARCH

1810

B U D G E T

ANNUAL BUDGET

BI-ANNUAL MARKET STUDIES \$35,000

SPOT SURVEYS 20,000

CONTINUING DATA COLLECTION 5,000

TOTAL \$60,000

In weighing the importance of technical research to an industry such as ours, it is well to consider that the chemical industry as a whole invests over 450 million dollars per year in technical research, the majority of it in the field of organic chemistry which includes the many so-called "plastic" materials which represent one of our most aggressive competitors.

It is also interesting to know that according to a recent Conference Board report all manufacturing industry in the United States is spending an average of 2% of net sales on research. (Incidentally, 46.5% of this expenditure comes from government funds). The Conference Board report also shows that the Stone, Clay, and Glass industry in 1957 spent 1.3% of net sales on technical research (of which only 7% was supplied by the government).

TECHNICAL RESEARCH

1813

[Vol. 138]

In recommending sound consideration of supplementary technical research, the fine work of individual glass container companies and the Preston Laboratories, as well as other interested organizations should not be discounted. However, the rapid pace of modern industry advancement seems to call for a broader effort.



TECHNICAL RESEARCH

HAS SPAWNED MANY NEW AND
IMPROVED COMPETING
PACKAGING MATERIALS

IN ONE SENSE WE HAVE BEEN "OUT RESEARCHED"

THE QUESTION ...

IS IT POSSIBLE THROUGH TECHNICAL
RESEARCH TO LEARN HOW TO PRODUCE
LIGHTER, STRONGER, GLASS CONTAINERS?

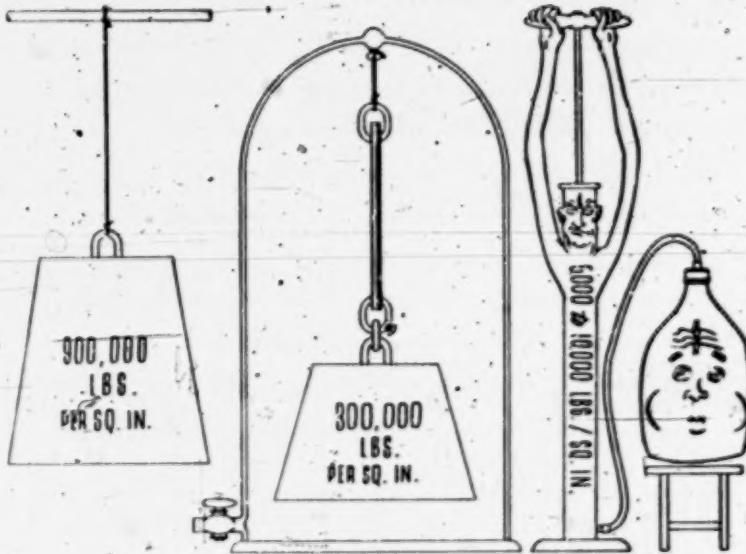
IT PROBABLY IS,
BECAUSE ...

It is well known that a high silica glass fibre can be made which has a tensile strength of nine hundred thousand pounds per square inch, - four times as strong as steel.

It is not quite so well known that experiments at Corning Glass Works have shown that glass need not be drawn into a fibre in order to exhibit these high strengths. They have had glass rods the size of a pencil sustain weights representing stresses of 300,000 pounds per square inch upon the glass for six months on end, - when they were maintained in a vacuum. As soon as the valve is opened and the atmosphere admitted to the presence of the glass, apparently the moisture in the atmosphere causes the strength to drop to less than 10,000 pounds per square inch within ten minutes.

We know that in a bottle we do not retain more than five to ten thousand pounds per square inch of this inherent strength of glass. If through research we could unlock the secret of these high strengths and apply it to bottles, we would have the answer to our weight and breakage problems. Even an increase of 1% in the retained strength would double the strength of our bottles.

We are UTILIZING only
ONE PER CENT



of the **INHERENT STRENGTH**
of **GLASS**

If we were to apply the terms of the investment business to investments made in research, we would say that "blue chip" research projects are those which will, almost without fail, give a return on the investment within a reasonable length of time.

Naturally, whatever is done in the field of technical research would have to be determined by a committee of the top research men from our industry. What is shown here is in the way of a "for instance", - an example of which might be done. The type of research institute referred to would be one such as Battelle Memorial Institute, Armour Research Institute, or Arthur D. Little Company.

A wild cat project is one whose outcome cannot be foreseen at this distance, but if successful, would bring tremendous returns on the original investment. The one suggested here is the one which might unlock the secret of glass strength. It would benefit the whole glass industry and it's reasonable to expect that the other parts of the glass industry would join with us in financing such a project if we were successful in finding the university and the right people to do the job.

TECHNICAL RESEARCH PROGRAM

1. TWO "BLUE CHIP" PROJECTS

AT A RECOGNIZED RESEARCH INSTITUTE ...

2. "THE CAUSE AND CURE OF CHECKS"

6. "COATINGS FOR GLASS CONTAINERS"

... THE OUTPUT OF A FEEDER TO BE RENTED FROM
A GLASS COMPANY, FOR EXPERIMENTAL WORK

2. ONE "WILD CAT" PROJECT

AT A UNIVERSITY ...

"THE BASIC STRUCTURE OF GLASS AND
GLASS SURFACES"

... A JOINT PROJECT WITH THE OTHER
GLASS INDUSTRIES

... A JOB FOR TOP-FLIGHT, SOLID-STATE
PHYSICISTS

... THE RESULTS TO BE PUBLISHED

It takes time to get started on basic research. It will be very difficult to assemble the right people and it is not expected that full scale operation on the university project could be achieved sooner than in the fourth year. The fourth year budget as shown would probably be a maximum, as it is difficult to see how you could spend at a rate much higher than this.

TECHNICAL RESEARCH BUDGET

1. INSTITUTE PROJECTS ...

1. "CAUSE AND CURE OF CHECKS"	\$ 75,000.
2. "COATINGS FOR GLASS CONTAINERS"	75,000.

2. UNIVERSITY PROJECTS ...

*"Basic Structure of Glass &
Glass Surfaces"*

	TOTAL	CCMI SHARE
FIRST YEAR	\$ 100,000.	\$ 50,000.
SECOND YEAR	100,000.	50,000.
THIRD YEAR	200,000.	100,000.
FOURTH YEAR AND AFTER	250,000.	125,000.

TOTAL CCMI FIRST YEAR \$200,000.

GLASS HANDLING
RESEARCH

[fol. 167]

1822

This subject has been under discussion for over two years by the Container Design and Specification Committee.

It is generally acknowledged in the industry that more work should be done, particularly with the equipment manufacturers in order to provide glass packers with the best possible material aids towards increasing their efficiency and thereby reducing the cost of goods packaged in glass.

GLASS HANDLING RESEARCH

IS NEEDED TO BROADEN
GLASS CONTAINER MARKETS

BECAUSE ...

THE RETAILER, THE DISTRIBUTOR,
THE PACKER AND THE EQUIPMENT
MANUFACTURER
STAND BETWEEN US AND
THE CONSUMER

1824

[Vol. 169]

There are many other ways
and means besides those listed here
whereby a glass handling engineer
on the G. C. M. I. staff could be effective
in improving the science of glass
packaging.

GLASS HANDLING RESEARCH

will get Action through...

- * PERSONAL CONFERENCES WITH EQUIPMENT ENGINEERS
- * TRADE PAPER ARTICLES
- * TALKS TO ASSOCIATIONS AND OTHERS
- * GLASS IN UNIVERSITY "CANNERS
AND FREEZER" SCHOOLS
- * CURRICULA FOR UNDERGRADUATE SCHOOLS
- * BULLETINS TO GLASS CONTAINER COMPANIES
- * WORK ON SPECIAL PRODUCTS WITH
SELECTED PACKERS
- * DISTRIBUTION OF BLUE PRINTS
- * COOPERATION WITH GCM DESIGN RESEARCH
PROGRAM

This is largely an educational job and it will not be an effort to duplicate the work of the many fine glass handling engineers who are presently working in the field for individual glass companies. As a matter of fact, this G. C. M. I. engineer could assume the responsibility of the overall educational job, thereby releasing individual company engineers to devote full time to their own problems.

GLASS HANDLING RESEARCH PROGRAM

ONE MAN, A COMPETENT GLASS HANDLING
ENGINEER WORKING FOR GCMI,
CAN GET RESULTS THROUGH SPARKING
COOPERATIVE EFFORT

between...

EQUIPMENT MANUFACTURERS
PACKERS' ASSOCIATIONS
UNIVERSITIES
TRADE PAPERS
SELECTED PACKERS

1828

[fol. 173]

This budget should be self-explanatory and since it is very modest, the practical results should surely outweigh the costs.

GLASS HANDLING RESEARCH

1829

B U D G E T

SALARY \$12,000

TRAVEL & BUSINESS ENTERTAINMENT 5,000

REPRINTS, FOLDERS, BLUEPRINTS 10,000

\$27,000

OFFICE, STATIONERY, ETC, INCLUDED IN
M & R DIVISION EXPENSE

DESIGN RESEARCH

It has been suggested that a consulting industrial designer from outside the industry, accustomed as he is to studying the appearance and the functioning of consumer items in the trade and in the home, could come up with ideas which could be adapted by the Container Design and Specification Committee to G. C. M. I. recommended designs, giving them greater appeal and therefore greater acceptance and wider use. This would also stimulate progress in the thinking of the committee to make its work more effective.

An example of what might have been done is found in the dairy container field. A designer could well have hit upon the idea of square milk bottles with its great saving advantage prior to the introduction of the paper milk bottle which might have somewhat retarded the invasion of that portion of the glass container market.

DESIGN RESEARCH

**CAN INCREASE GLASS HOUSE
EFFICIENCY THRU ...**

LONGER RUNS AND FEWER MOLD CHANGES

**GIVING CCECI RECOMMENDED DESIGNS MAXIMUM
APPEAL TO CONSUMER, RETAILER, PACKER**

FOSTERING THEIR WIDER USE THRU ...

PUBLICITY

TRADE PAPER ADVERTISING

PRESTIGE VALUE OF OUTSIDE DESIGNER

MORE GLAMOROUS NAMES

FURNISHING GLASS CONTAINER SALESMEN WITH...

SELLING IDEAS, IN BULLETINS

**BROCHURES SHOWING POSSIBILITIES OF
INDIVIDUALITY THRU LABEL TREATMENT, ETC.**

BULLETINS SHOWING FILLING-LINE

ADVANTAGES OF RECOMMENDED DESIGNS

1833



[fol. 178]

Such an industrial designer, supplementing the market research program, might well, through imaginative design and research, develop new uses for glass containers or so increase the appeal of present containers as to widen their use.

DESIGN RESEARCH

1834

CAN BROADEN THE MARKET FOR GLASS CONTAINERS by...

ANTICIPATING MARKET NEEDS AND FORESTALLING
POTENTIAL COMPETITION

DEVELOPING THE RIGHT CONTAINER FOR NEW
PRODUCTS NOT NOW IN GLASS

WIDENING PRESENT USES THRU MORE
FUNCTIONAL DESIGN

STIMULATING BOLD DEPARTURES FROM TRADITION
TO KEEP DESIGNS MODERN

REDUCING COSTS TO PACKERS

KEEPING PACKAGE DESIGNERS CONSCIOUS
OF GLASS, ITS DESIGN POTENTIALITIES

MAKING PUBLIC AWARE OF NEWNESS OF
GLASS, THRU PUBLICITY AND EXHIBITS

In addition to the activities already mentioned, a design research program should include the sponsoring of competition among industrial design students and photographers so that when they go out into industry and are called in on packaging problems they will be favorably inclined toward glass.

At present the plastics industry is virtually pre-empting this important means of market development.

DESIGN RESEARCH

Program

COMMISSION CREATIVE DESIGNER TO . . .

SEEK OUT NEW USES FOR GLASS CONTAINERS
RECOMMEND FUNCTIONAL DESIGNS FOR THEM
FASHION NEW DESIGNS FOR SPECIFIC OLD PRODUCTS
SUBMIT IDEAS FOR PROMOTING USE OF
G.C.M.I. RECOMMENDED DESIGNS

COMMITTEE ON CONTAINER DESIGN AND SPECIFICATION

CONSIDER DESIGNER'S RECOMMENDATIONS AT
BI-MONTHLY MEETINGS
DIRECT PREPARATION OF DRAWINGS, PUBLICITY,
ADVERTISING, BULLETINS AND BROCHURES
SPONSOR COMPETITION AMONG INDUSTRIAL
DESIGN STUDENTS AND PHOTOGRAPHERS

GLASS HANDLING ENGINEER, COOPERATING

[fol. 183]

DESIGN RESEARCH

1838

B U D G E T

COMMISSIONS FOR
DESIGN SERVICES

\$15,000

PRIZES AND EXPENSES OF
CONTESTS AND EXHIBITS

5,000

\$20,000

ADVERTISING
and
PUBLICITY

It is not enough to have the best container. The consumer, the packer, the retailer, the distributor and their employees all exercise a choice which can operate either for or against glass containers.

They must be made to understand and to recall the advantages of glass, through educational advertising and publicity.

Several association executives have told me of a valuable byproduct of their association advertising programs. Such programs almost invariably increase the morale and self-esteem of the industry, and raise the value of the industry product in the thinking of their sales people. This results in better sales effort.

ADVERTISING *and* PUBLICITY

1841

is needed for Glass Containers

BECAUSE ...

- * GLASS IS TAKEN FOR GRANTED
- * MISCONCEPTIONS MUST BE CORRECTED
- * PREJUDICES MUST BE OVERCOME
- * COMPETITION IS ADVERTISING HEAVILY
- * ACCEPTANCE IS NOT ENOUGH : ...
ACTIVE PREFERENCE MUST
BE SECURED

1842

[fol. 187]

The accumulated evidence of
this survey points unmistakably to the
fact that the glass container industry
has a product which is susceptible to
successful promotion.

ADVERTISING *and* PUBLICITY

*can effectively increase
glass container sales...*

- * CORRECTING MISCONCEPTIONS WILL REMOVE
PREJUDICE, CREATE ACCEPTANCE
- * MAKING PUBLIC CONSCIOUS OF GLASS
WILL AWAKE DORMANT PREFERENCE
- * PROMOTION OF DRAMATIC QUALITIES
OF GLASS WILL CREATE ACTIVE
CONSUMER DEMAND
- * CREATION OF CONSUMER DEMAND
WILL ENCOURAGE PACKERS
TO USE GLASS

[fol. 189]

1844

The final copy strategy would not be determined, of course, until the results of the consumer survey were at hand and until advertising and publicity agencies had been selected.

This program would need genius level treatment to keep it from being too abstract, but such treatment could be obtained from proper agency selection.

ADVERTISING *and* PUBLICITY STRATEGY

DRAMATIC PRESENTATION ...

TO CREATE GLASS CONSCIOUSNESS
TO MAKE A FORCEFUL IMPRESSION

ATTACK ON A BROAD FRONT ...

BABY FOOD ... BEER ... FRUIT ... MILK ... ETC.

ALTERNATE ADS ... SELLING ANY ONE
USE SELLS ALL, BECAUSE IT ALL
SELLS GLASS AS A CONTAINER

CENTRAL THEME APPLICABLE TO
ALL GLASS CONTAINERS

"IT'S BETTER IN GLASS"

With the present day high cost of magazine space and television time and production it is absolutely essential to have total impact, which means using the newest techniques to obtain publicity which is sometimes referred as to uncontrolled impact (since editors may change your wording to conform to their use of the material) in addition to the controlled impact of advertising where you tell your message just as you want it to appear.

**EMPHASIZE DIFFERENT QUALITIES FOR
DIFFERENT USES ...**

BABY FOOD... "NOTHING PROTECTS LIKE GLASS"

BEER... "IT TASTES BETTER IN GLASS"

FRUITS... "YOU CAN SEE IT'S BETTER IN GLASS"

MILK... "IT KEEPS BETTER IN GLASS"

CONTINUITY ...

KEEPING EVERLASTINGLY AT IT

BRINGS SUCCESS

TOTAL IMPACT ...

CONSUMER ADVERTISING

TRADE ADVERTISING

PUBLICITY

[fol. 193]

It has sometimes been said that the glass container story is too abstract to be told in a general advertising program.

It is true that continual repeating of the excellent but somewhat timeworn motto "See What You Buy, Buy in Glass", is not enough to strongly affect consumer preference.

The question is, for example, how do you convey the fact that glass is chemically inert?

[fol. 194]

1849

DRAMATIC WAYS
CAN BE FOUND ...

TO TELL THE STORY OF
THE ADVANTAGES OF GLASS

such as ...

30

1850

[fol. 195]

Here is the way Corning
Glass Works did it in a very effective
advertisement which appeared in
Business Week Magazine.

[fol. 196]

[Illustration omitted]

Here is an example of what an advertising and publicity program for the glass container industry might cover. However, as previously stated, this is not a final recommendation. The choice of media and the whole plan of campaign can only be developed when the experts from the advertising and publicity agencies have been brought into the picture.

It must be emphasized that extremely skillful treatment will be needed and strong demands will have to be made upon the agencies.

Again, the impact available through the free channels of publicity must be skillfully used to back up the advertising.

ADVERTISING *and* PUBLICITY

Program

ADVERTISING . . .

CONSUMER MEDIA
TRADE PAPERS

PRINTED MATERIAL . . .

CONSUMER BOOKLETS
SCHOOL BOOKLETS
TRADE BOOKLETS
PACKER BOOKLETS
STORE DISPLAY MATERIAL

PUBLICITY . . .

NEWS STORIES, PICTURES
MAGAZINE FEATURE ARTICLES
COLUMNISTS
WOMEN'S PAGES
HOME ECONOMISTS
TELEVISION TIE-UPS
MOTION PICTURE TIE-UPS
EDUCATIONAL MATERIAL FOR SCHOOLS
TRADE PAPER PUBLICITY
INTER-INDUSTRY COOPERATION

[fol. 196]

The best available advice from advertising consultants and the managers and agencies handling other association programs, concur in the opinion that program for the glass container industry could incorporate a minimum of \$1,000,000 for time and/or space to be effective.

The allowance here for printed material covers the "merchandising" of the program which would be accomplished through direct mail to the glass container companies, their salesmen and the trade.

ADVERTISING and PUBLICITY**B U D G E T***Recommended Program***ADVERTISING**SPACE AND/OR TIME
PRODUCTION\$ 1,100,000.
165,000.**PUBLICITY**

SERVICES, EXPENSES

80,000.

PRINTED MATERIAL

PRODUCTION & DISTRIBUTION

110,000.

TOTAL :

\$ 1,455,000.

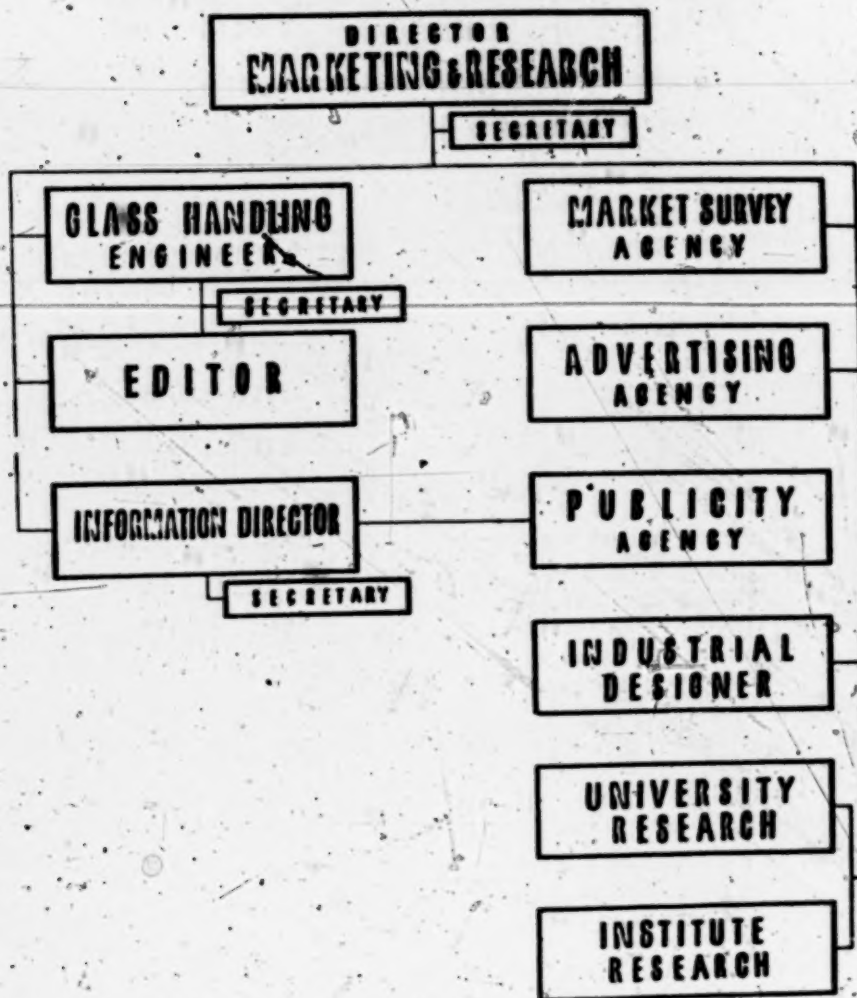
Overall
ORGANIZATION
and
BUDGET

The organization shown here represents a tight, economical operation, costing considerably less than the normal allowance for management and overhead.

It contemplates that the account executive and copy writer of the advertising agency will fulfill the function of advertising manager.

The Information Director will originate publicity releases and will handle such promotional activities as speeches at conventions, etc.

ORGANIZATION CHART



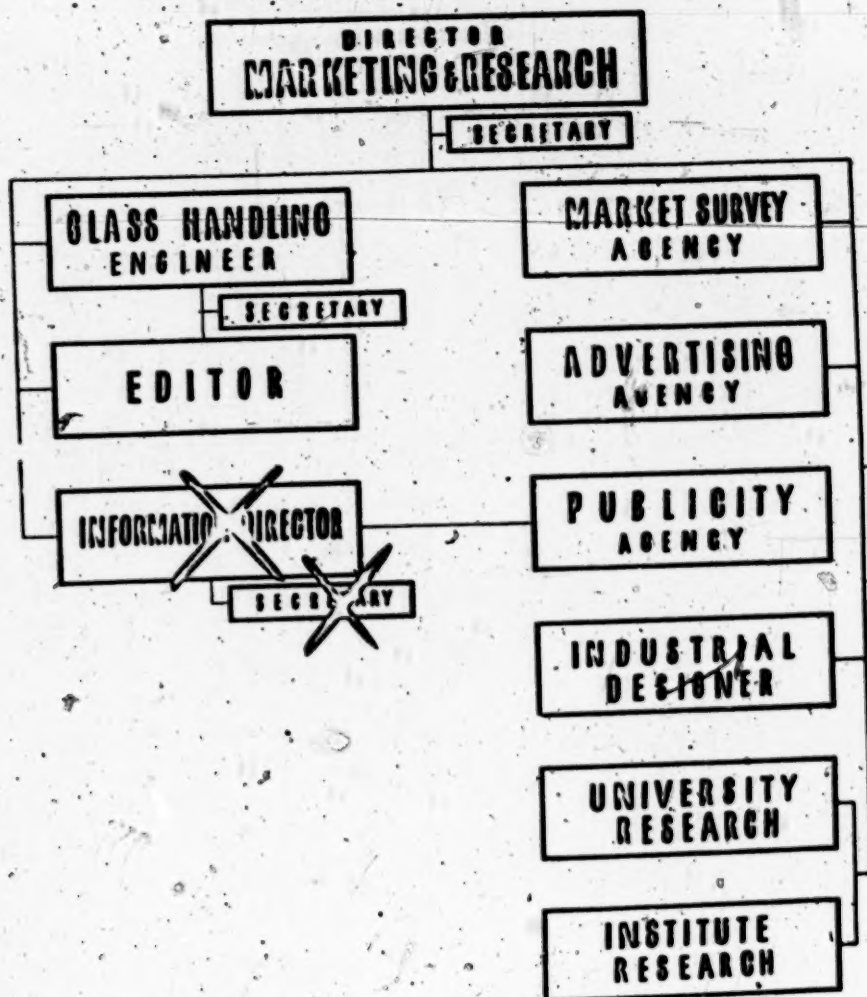
1859

[fol. 204]

On a minimum program basis,
the Information Director and his secretary could be eliminated, by reducing the emphasis placed on publicity and transferring more of the work to a publicity agency.

MINIMUM PROGRAM ORGANIZATION CHART

1860



1861

[fol. 206]

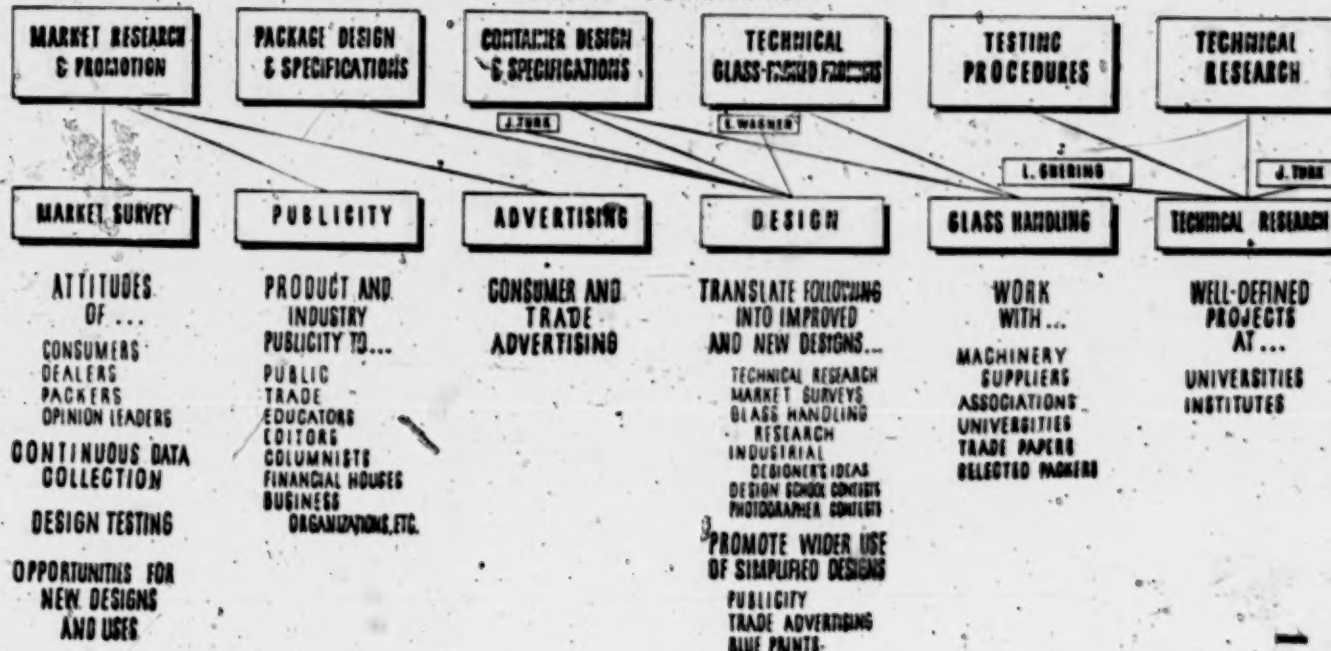
This chart shows how the proposed activities would be integrated into the present G. C. M. I. structure for effective control and guidance, and to draw upon the talents of industry committee members.



ORGANIZATION CHART

FUNCTIONS

GCMC COMMITTEES



[247-101]

1862

1863

[fol. 208]

The total of the budget as shown here, represents about 3/10 of 1% of the glass container industry's annual dollar sales.

MARKETING & RESEARCH DIVISION

1864

B U D G E T*Recommended Program*

SALARIES	\$ 78,500.
RENT & FACILITIES	8,000.
TELEPHONE & TELEGRAPH	8,000.
TRAVEL & BUSINESS ENTERTAINMENT	18,000.
STATIONERY, SUPPLIES, TAXES, ETC.	8,000.

SUB-TOTAL **\$115,500.**

MARKET RESEARCH	\$ 60,000.
DESIGN RESEARCH	20,000.
GLASS HANDLING RESEARCH	10,000.
TECHNICAL RESEARCH	200,000.
ADVERTISING AND PUBLICITY	1,455,000.
	\$1,860,500.

1865

[fol. 210]

MARKETING & RESEARCH DIVISION

B U D G E T

Minimum Program

SALARIES	\$ 60,000.
RENT & FACILITIES	6,000.
TELEPHONE & TELEGRAPH	2,400.
TRAVEL & BUSINESS ENTERTAINMENT	13,000.
STATIONERY, SUPPLIES, TAXES, ETC.	6,000.

SUB-TOTAL \$ 87,400.

MARKET RESEARCH	\$ 50,000.
DESIGN RESEARCH	20,000.
GLASS HANDLING RESEARCH	10,000.
TECHNICAL RESEARCH	200,000.
ADVERTISING & PUBLICITY	890,000.

\$ 1,257,000.

ADVERTISING & PUBLICITY B U D G E T

	RECOMMENDED PROGRAM	MINIMUM PROGRAM
ADVERTISING SPACE AND/OR TIME	\$ 650,000.	\$ 1,100,000
PRODUCTION	110,000.	165,000.
PUBLICITY SERVICES & EXPENSES	60,000.	80,000
PRINTED MATERIAL	70,000.	110,000
	<hr/>	<hr/>
	\$ 890,000	\$ 1,455,000

[fol. 212]

GOVERNMENT'S EXHIBIT 42

Philadelphia Store Audits

Baby Food

Period of November, 1954 to October, 1955

For

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

[fol. 213]

**Ford Sammis & Company
Marketing Economists**

**750 Colorado Boulevard
Los Angeles 41, California
CLinton 5-7101**

**500 Fifth Avenue
New York 36, New York
CHickering 4-4363**

June 18, 1956.

**Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York, New York**

**Attention: Mr. Richard L. Cheney, Director Market Re-
search & Promotion Division.**

Subject: Philadelphia Store Audits—Baby Food.

Gentlemen:

**Transmitted herewith is a summary report on the store
audits conducted in Philadelphia super-markets on baby
food sales for the period of November, 1954 to October,
1955.**

Respectfully, Ford Sammis.

[fol. 214] How the Audits Are Conducted

A carefully selected group of 15 super-markets spread out over the Philadelphia Metropolitan Area represent the panel used in these audits.

Trained auditors visit each store every 8 weeks and take an actual physical inventory of all items being studied, counting warehouse stock as well as shelf stock. An audit is made of the store's invoices to determine the exact number of units of each item received by the store since the previous inventory.

Sales of each item are then computed according to the formula

$$\begin{array}{r} \text{Opening inventory} \\ \text{plus} \\ \text{Purchases received} \\ \text{less} \\ \text{Closing inventory} \\ \text{equals} \\ \text{Sales during audit period.} \end{array}$$

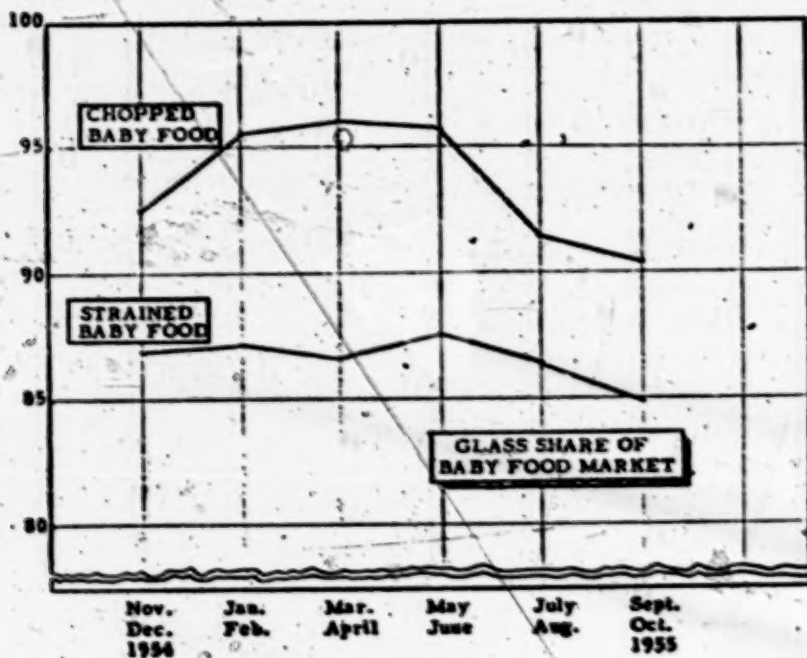
This is an accurate, proven method of determining consumer purchases.

[fol. 215]

Summary

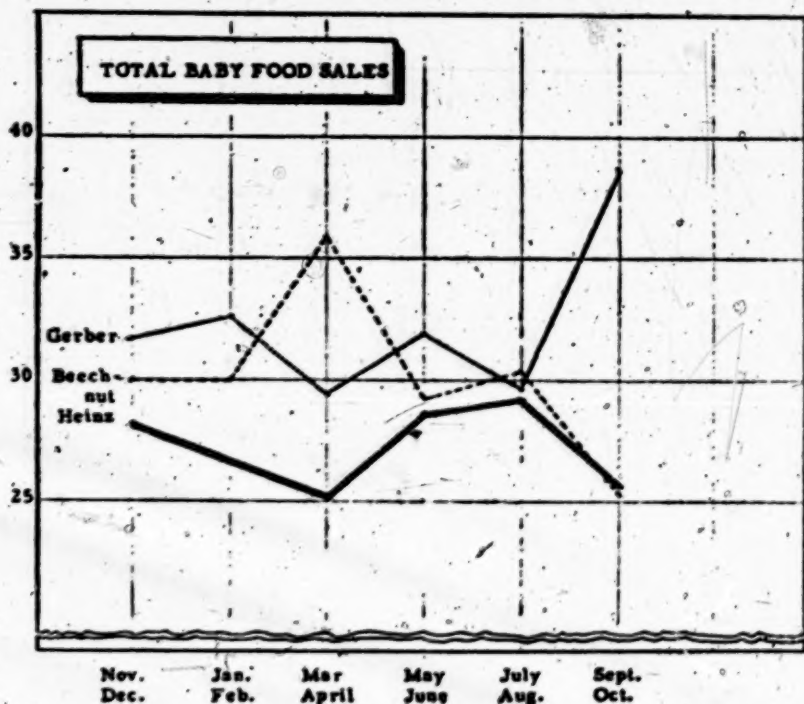
During the entire period covered by these audits, baby food in the Philadelphia area has been sold predominately in glass. Glass has represented from 86.2% to 89.3% of total sales during the period of November, 1954 to October, 1955.

Glass has been in a stronger position in the chopped baby food field than with strained variety, which has been true in Los Angeles, also.



[fol. 216] Chopped baby food represents about 20% of total baby food sales in Philadelphia, in comparison with 35% of total sales in Los Angeles. This indicates that Los Angeles, the proverbial mecca of dieters and crackpots of all sorts, goes in stronger for adult consumption of baby food. (Or else its youngsters turn athletic at an early age and chomp chopped food when infants in Philadelphia are still only able to gum-chew the strained variety.)

Gerbers is the leading brand in Philadelphia, but by no means as great a margin as it enjoys in Los Angeles. Heinz and Beechnut are close neck-and-neck seconds to Gerber, particularly in the chopped food field.



[fol. 217] Sales of Baby Food in Philadelphia Food Stores

	1954	1955				
	Nov. Dec.	Jan. Feb.	Mar. April	May June	July Aug.	Sept. Oct.
Sales by Container						
Total Baby Food						
Glass.....	88.0%	89.0%	88.5%	89.3%	87.3%	86.2%
Tin.....	12.0	11.0	11.5	10.7	12.7	13.8
Strained Baby Food						
Glass.....	86.9	87.2	86.6	87.6	86.4	84.9
Tin.....	13.1	12.8	13.4	12.4	13.6	15.1
Chopped Baby Food						
Glass.....	92.5	95.6	96.0	95.8	91.5	90.5
Tin.....	7.5	4.4	4.0	4.2	8.5	9.5
Sales by Type of Baby Food						
Strained.....	79.6	79.8	78.6	79.6	81.2	78.9
Chopped.....	20.4	20.2	21.4	20.4	18.8	21.1
Sales by Brands						
Total Baby Food						
Gerber.....	31.8%	32.7%	29.4%	32.0%	29.8%	37.2%
Heinz.....	28.3	26.6	25.1	28.9	29.4	25.7
Beechnut.....	30.0	30.0	35.9	29.2	30.4	25.4
All others.....	9.9	10.7	9.6	9.9	10.4	11.7
Strained Baby Food						
Gerber.....	32.3	33.9	28.7	32.1	28.9	38.8
Heinz.....	27.0	25.8	24.4	28.4	29.4	25.4
Beechnut.....	29.1	27.9	35.8	28.0	30.7	23.4
All others.....	11.6	12.4	11.1	11.5	11.0	12.4
Chopped Baby Food						
Gerber.....	40.0	28.3	32.4	31.4	34.3	31.7
Heinz.....	31.6	30.1	27.6	30.1	29.2	26.7
Beechnut.....	33.4	37.9	36.2	33.6	28.4	33.0
All others.....	5.0	3.7	3.8	4.8	8.1	8.6

[fol. 218]

GOVERNMENT'S EXHIBIT 43

Baby Food Container Situation

1956

For

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

[fol. 219]

Ford Sammis & Company
Marketing Economists

750 Colorado Boulevard
Los Angeles 41, California
CLinton 5-7101

500 Fifth Avenue
New York 36, New York
CHickering 4-4363

December 7, 1956.

Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York 16, N. Y.

Attention: Mr. Richard L. Cheney, Director, Market Research and Promotion

Subject: Baby Food Container Situation—1956

Gentlemen:

This report summarizes data on baby food containers from G.C.M.I. national consumer and retailer surveys during the past three years, and from store audits conducted in Los Angeles stores since October, 1954. In certain instances, where applicable, reference is made to a consumer survey conducted throughout California in 1953 for the West Coast Sub-Committee.

The charts used are those shown at the Semi-Annual Meeting of G.C.M.I. at Phoenix in November, 1956.

All data in this report apply to the area West of the Mississippi, where tin and glass are in active competition for the baby food market. East of the Mississippi, baby food sales and preference have been 90% glass for several years.

Respectfully, Ford Sammis.

[fol. 220]

GOVERNMENT'S EXHIBIT 44

Los Angeles Store Audits

Baby Food

Period of November, 1954 to April, 1957

for

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

[fol. 221]

Ford Sammis & Company
Marketing Economists

750 Colorado Boulevard
Los Angeles 41, California
CLinton 5-7101

500 Fifth Avenue
New York 36, New York
CHickering 4-4363

June 7, 1957.

Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York 16, N. Y.

Attention: Mr. Richard L. Cheney

Subject: Los Angeles Store Audits—Baby Food

Gentlemen:


Transmitted herewith is a report on the store audits conducted in Los Angeles super-markets on baby food sales for the period November, 1954 to April, 1957.

This report is for your confidential information.

Respectfully, Ford Sammis.

[fol. 222]

GOVERNMENT'S EXHIBIT 45



Baby Food Container Situation

1958

for

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

1878

[fol.223]

**Ford Sammis & Company
Marketing Economists**

**750 Colorado Boulevard
Los Angeles 41, California
CLinton 5-7101**

**54 Mill Lane
Huntington, New York
HAmilton 7-4791**

October 1, 1958.

**Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York 16, N. Y.**

**Attention: Mr. Richard L. Cheney, Executive Director &
Marketing Manager**

Subject: Baby Food Container Situation, 1958

Gentlemen:

This report summarizes data on the baby food container situation from national consumer surveys conducted annually for G. C. M. I. since 1954. It has been prepared for the confidential information of your organization and its member companies.

The sole purpose of this report is to portray the situation affecting baby food *containers*. However, in order to present the container situation clearly and completely it is necessary to cover brand preference as well as container preference, since the two are inextricably inter-related.

Sincerely, Ford Sammis.

[fol. 224]

GOVERNMENT'S EXHIBIT 46

Survey of California Baby Food Market
for

Glass Container Manufacturer's Institute, Inc.

Copy No. 11 for the confidential use of Mr. W. H.
Stephenson

Ford Sammis
Marketing Economist

1880

[fol. 225]

Ford Sammis
Marketing Economist

530 West Sixth Street, Los Angeles 14
TRinity 9549

September 24, 1953.

Glass Container Manufacturers Institute
8 West 40th Street
New York 18, N. Y.

Attention: Mr. Richard Cheney

Gentlemen:

Transmitted herewith is report on "Survey of California Baby Food Market." This survey was conducted to secure factual information required to determine the following objectives:

- (1) Can sales of baby food in glass jars be increased in California?
- (2) Will promotion by Glass Container Manufacturers Institute be effective in increasing sales?
- (3) Approximately how much will it cost to do the job, and how long will it take to show significant results?
- (4) What strategy and what media will accomplish the task most effectively and efficiently?

This report covers the findings from surveys of 800 mothers with babies under 2 years old, 200 grocery stores, and 34 wholesaler and chain store headquarters. Samples used in the surveys represent a balanced cross-section of the entire State of California.

Recommendations are presented in a separate letter to the West Coast Sub-Committee on Market Research and Promotion.

Respectfully, Ford Sammis.

FS:ht

[fol. 226] GOVERNMENT'S EXHIBIT 47

Los Angeles Store Audits

Soft Drinks

Period of November, 1954 to October, 1956

For

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

1882

[fol. 227]

Ford Sammis & Company
Marketing Economists

750 Colorado Boulevard
Los Angeles 41, California
CLinton 5-7101

500 Fifth Avenue
New York 36, New York
CHickering 4-4363

January 7, 1957.

Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York, New York

Attention: Mr. Richard L. Cheney, Director of Market Research and Promotion Division

Subject: Los Angeles Store Audits—Soft Drinks

Gentlemen:

Transmitted herewith is a report on the store audits conducted in Los Angeles super-markets on soft drink sales for the period of May-October, 1956. This supplement and brings up-to-date the report previously submitted covering the period November 1954 to April 1956. This report is for your confidential information.

Respectfully, Ford Sammis.

[fol. 228]

GOVERNMENT'S EXHIBIT 48

Soft Drink Container Situation in Los Angeles

1956

for

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

[fol. 229]

Ford Sammis & Company
Marketing Economists

750 Colorado Boulevard
Los Angeles 41, California
CLinton, 5-7101

500 Fifth Avenue
New York 36, New York
CHickering 4-4363

December 7, 1956.

Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York 16, N. Y.

Attention: Mr. Richard L. Cheney, Director
Market Research and Promotion

Subject: Soft Drink Container Situation in Los Angeles—
1956

Gentlemen:

This report summarizes the soft drink container situation in the Los Angeles market as reflected by two consumer surveys conducted in October, 1955, and October, 1956. Each survey consisted of personal interviews with 900 consumers (evenly divided among men, women and children). Additional data are presented from store audits conducted in Los Angeles stores since November, 1954.

Cordially, Ford Sammis.

1885

[fol. 230]

GOVERNMENT'S EXHIBIT 49

Soft Drink Market Survey

For

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

[fol. 231]

Ford Sammis
Marketing Economist

530 West Sixth Street, Los Angeles 14
Trinity 9549

March 1, 1955.

Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York 16, New York

Attention: Mr. Richard L. Cheney, Director

Market Research & Promotion Division

Gentlemen:

Transmitted herewith is report on "Soft Drink Container Market Survey," conducted at your request for the information of your Institute and member companies.

Purpose of this survey was to investigate:

- (a) Extent and strength of consumer and retailer preference for bottles or cans as soft drink containers
- (b) Motivations affecting container preference
- (c) Characteristics of the soft drink market

Respectfully, Ford Sammis.

[fol. 232]

GOVERNMENT'S EXHIBIT 50

Long Angeles Store Audits

Soft Drinks

Period of November, 1954 to July, 1957

for

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

[fol. 233]

Ford Sammis & Company
Marketing Economists

750 Colorado Boulevard
Los Angeles 41, California
CLinton 5-7101

54 Mill Lane
Huntington, New York
HAMilton 7-4791

July 29, 1957.

Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York 16, N.Y.

Attention: Mr. Richard L. Cheney

Subject: Los Angeles Store Audits—Soft Drinks

Gentlemen:

Transmitted herewith is a report on the store audits conducted in Los Angeles super-markets on soft drink sales covering the period of November, 1954 to July, 1957.

This report is for your confidential information.

Respectfully, Ford Sammis.

[fol. 234]

GOVERNMENT'S EXHIBIT 51

Survey on Canned Soft Drinks in Philadelphia
For
Glass Container Manufacturers Institute, Inc.

Ford Sammis
Marketing Economist

1890

[fol. 235]

Ford Sammis
Marketing Economist

530 West Sixth Street, Los Angeles 14
Trinity 9549

June 17, 1954.

Glass Container Manufacturers Institute, Inc.
8 West 40th Street
New York 18, New York

Attention: Mr. Richard L. Cheney, Director

Market Research & Promotion Division

Gentlemen:

Transmitted herewith is report on "Survey on Canned Soft Drinks in Philadelphia" conducted at your request for the confidential information of your organization and its members.

Purpose of this survey was to study consumer and retailer reaction to canned soft drinks and to determine to what extent cans have penetrated the soft drink market.

Philadelphia was chosen because this was one of the first markets where canned soft drinks were introduced in 1953, and has been subject to intense promotion on this product for the past year and a half.

Respectfully, Ford Sammis.

FS:ht.

[fol. 236]

GOVERNMENT'S EXHIBIT 52

An Appraisal of the Success of the One-Way Beer Bottle
in the Baltimore Market and a Comparison with the
Detroit Market

1892

[fol. 237] McKinsey & Company
Management Consultants

New York, Washington, Boston, Chicago, San Francisco,
Los Angeles

60 East 42nd Street
New York 17, N.Y.
February 23, 1955.

Mr. Richard L. Cheney
Director of Market Research
Glass Container Manufacturers Institute Inc.
New York, New York

Dear Mr. Cheney:

The visual material contained herein was presented to the Beer Bottle Marketing Sub-Committee on February 16, 1955.

The Committee requested photostats of this material, as it was presented, for further study.

Summary of Conclusions

The Baltimore success of one-ways will be difficult to reproduce because of elements unique to the Baltimore situation. These elements are:

1. Motivation—a highly motivated leading brewer was a key factor in the one-ways' success.
2. Environment—the nature of the Baltimore market peculiarly favored one-ways.
3. Action—exceptionally skillful action was taken on the part of the Baltimore brewer in the important areas of selling, pricing, promotion, and advertising.

The failure of one-ways in Detroit can be traced to a far less favorable combination of motivation, environment, and action in that market.

[fol. 238] Report Organization

The report is divided into the following major sections:

Nature of the study

Appraisal of the Baltimore market for one way bottles

Cost, margin, and price data of a leading brewer

Summary of factors affecting the success of one-ways
in Baltimore

Market comparison—Baltimore versus Detroit

Why the Baltimore success will be difficult to duplicate.

Exhibits are found at the end of the report.

We appreciate the opportunity of working with you on
this very interesting assignment.

Respectfully submitted, McKinsey & Company.

1894

[fol. 239]

GOVERNMENT'S EXHIBIT 53

Distribution & Sales of One-Way Beer Bottles in Virginia
October, 1956

for

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

[fol 240]

Ford Sammis & Company
Marketing Economists

750 Colorado Boulevard, Los Angeles 41, California
CLinton 5-7101

500 Fifth Avenue, New York 36, New York
CHickering 4-4363

December 11, 1956.

Glass Container Manufacturers Institute, Inc.
99 Park Avenue
New York 16, N. Y.

Attention: Mr. Richard L. Cheney, Director
Market Research & Promotion

Subject: Distribution & Sales of One-Way Beer Bottles in
Virginia—October, 1956

Gentlemen:

This report covers a survey made among 136 off-premise beer outlets in Virginia during the latter part of October, 1956—5 months after sale of one-way bottles became legal. Store panels surveyed cover all types of outlets—supermarkets, small grocery stores, on-off sale taverns, service post exchanges, and drug stores. Each type of store was represented in the sample in proportion to its importance as a beer outlet, as determined by a consumer survey conducted in June, 1956.

Sales data were obtained from store manager's estimates of their sales. While not as reliable as actual store audits, the data are believed to be reasonably accurate because Virginia stores are required to pay cash on delivery for all beer, giving store managers intimate knowledge of beer purchases.

Respectfully, Ford Sammis.

1896

{fol. 241}

GOVERNMENT'S EXHIBIT 34

Consumer Survey Among Virginia Beer Drinkers
January 1957

for

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

[fol. 242]

**Ford Sammis & Company
Marketing Economists**750 Colorado Boulevard, Los Angeles 41, California
CLinton 5-7101500 Fifth Avenue, New York 36, New York
CHickering 4-4363

March 1, 1957.

Glass Container Manufacturers Institute, Inc.

99 Park Avenue

New York 16, N. Y.

Attention: Mr. Richard L. Cheney, Director
Market Research and PromotionSubject: Consumer Survey Among Virginia Beer Drinkers,
January, 1957.

Gentlemen:

This survey of personal interviews with 1037 beer drinking families was conducted in January, 1957, as a follow-up on a similar survey made in June, 1956, when one-way bottles were first legalized for off premise sale in Virginia.

Interviews were distributed equally in Alexandria, Richmond, Norfolk, and Roanoke. Advertising campaigns were conducted in the first three cities throughout the last six months of 1956 by G. C. M. I. and certain breweries sponsoring one-way bottles. Roanoke was used as a control market.

Reference is made to reports on the first consumer survey and on distribution surveys of retail beer outlets, for complete analysis of the Virginia beer situation.

This survey was conducted for the confidential information of your Institute and member companies.

Respectfully, Ford Sammis.

1898

[fol. 243]

GOVERNMENT'S EXHIBIT 55

Distribution & Sales of One-Way Beer Bottles in Virginia
June, 1956 to October, 1957

for

Glass Container Manufacturers Institute, Inc.

Ford Sammis & Company
Marketing Economists

1899

[fol. 244] Ford Sammis & Company
Marketing Economists

750 Colorado Boulevard, Los Angeles 41, California
CLinton 5-7101

54 Mill Lane, Huntington, New York
HAMilton 7-4791

December 6, 1957

Glass-Container Manufacturers Institute, Inc.
99 Park Avenue
New York 16, N. Y.

Attention: Mr. R. L. Cheney, Executive Director

Subject: Distribution & Sales of One-Way Beer Bottles in
Virginia—June, 1956 to October, 1957

Gentlemen:

This report covers surveys made among 136 off-premise beer outlets in Virginia in October, 1956, February, 1957, and October, 1957. Store panels surveyed cover all types of outlets—super-markets, small grocery stores, on-off sale taverns, service post exchanges, and ~~drug~~ stores. Each type of store was represented in the sample in proportion to its importance as a beer outlet, as determined by a consumer survey conducted in June, 1956.

Sales data were obtained from store manager's estimates of their sales. While not as reliable as actual store audits, the data are believed to be reasonably accurate because Virginia stores are required to pay cash on delivery for all beer, giving store manager's intimate knowledge of beer purchases.

Respectfully, Ford Sammis.

1900

[fol. 245]

GOVERNMENT'S EXHIBIT 56

Glass Container Manufacturers Institute
Market Research & Promotion Division

BB-#16

October 22, 1958.

To the Beer Bottle Manufacturers

Gentlemen:

Several people from our industry were invited to an informal meeting in the offices of Container Corporation of America on the 16th floor of 99 Park Avenue, New York, to see a new wrap-around style of six pack carrier for the new one-way beer bottle presently shown on the GCM I tentative drawing C-16600-T.

Their presentation was very interesting and they indicated that they would shortly have machines available that could automatically package six bottles of beer in this wrap-around carrier and insert four of the carriers in a case along with a divider.

These wrap-around six pack carriers will be sold for something less than \$30.00 per thousand and the automatic machines were quoted at \$15,000 to \$18,000 each and they have a speed of about 300 bottles per minute. They will probably be sold or leased to brewers.

The Container Corporation also had two or three ideas on outer cartons (to hold four to six packs) which they presented.

Mr. Robert M. Bennett, a sales manager of Container Corporation, will be glad to furnish any interested glass container manufacturers with samples and information on these items.

Within two weeks he plans a cross-country trip to make a presentation to a number of regional and national brewers in hopes of selling some installations.

Attached in dittoed form are figures which he presented to the meeting showing their estimates of packaging ma-

terial costs covering this bottle in their wrap-around six pack (at \$29.25/M), in two types of outer packs:

- (a) A special case with short, die-cut top flaps designed to catch under the crowns, and
- (b) Full height trays

[fol. 246] Estimates for cans in both trays and forty-eight pack, RSC cartons are also shown, and comparisons made between the two forms of packaging.

You will note in the attached charts, figures covering returnable partitions which is their suggested method of getting the empty glass to the brewer in the outer case, which will in turn be used by the brewer. Something of this kind is necessary since the glass company will not handle the six packs but they will be furnished flat to the brewer.

Each page has blanks in which the reader may insert his own estimates where they differ from theirs.

I am sure Mr. Bennett will be glad to answer any questions any of you may have about this new six pack carrier.

We felt it was a matter of sufficient interest that it should be relayed to you in the present form.

Sincerely, R. L. Cheney.

Attachment.

[fol. 247]

Packaging Material Costs

New Lightweight Non-Returnable Bottle in 200 lb. Special Case

Bottles (Including Regular Slotted Construction & Carton Set-up)		=3.87 per gross	per gross
Differential on Special Case (20.00/M) = 0.12 per gross			
(...../M)			
Elimination of Carton Setup	=0.050 per gross		per gross
Total Saving		=0.17 per gross	per gross
Net Bottle Cost (3.70 per gross) (..... per gross)		=3.700 per gross	per gross
Body Labels (0.6775/M) (...../M)	=0.15410 per six Pack		per six Pack
Crowns (0.3075 per gross) (..... per gross)	=0.00400 per six Pack		per six Pack
Six Packs (29.25/M) (...../M)	=0.01300 per six Pack		per six Pack
.040 Chip Cross Pack (5.00/M) (...../M)	=0.02925 per six Pack		per six Pack
.055 Returnable Fibre Partition	=0.00125 per six Pack		per six Pack
(Including cost + Brewery labor + Return Freight)	=0.00230 per six Pack		per six Pack
Total Cost	=0.20390 per six Pack		per six Pack

[fol. 248-249]

Packaging Material Costs

New Lightweight Non-Returnable Bottle in 175 lb. Trays

Bottles (Including tray and carton set-up)	= 3.60 per gross	per gross
Elimination of Carton Set-up	= 0.95 per gross	per gross
Net Bottle Cost	= 3.55 per gross	per gross
Net Bottle Cost (3.55 per gross) (..... per gross)	= 0.14790 per six Pack	per six Pack
Body Labels (0.6775/M) (...../M)	= 0.00400 per six Pack	per six Pack
Crowns (0.3075 per gross) (..... per gross)	= 0.01300 per six Pack	per six Pack
Six Pack (29.25/M) (...../M)	= 0.02925 per six Pack	per six Pack
.040 Chip Cross Pack (5.00/M) (...../M)	= 0.00125 per six Pack	per six Pack
.055 Returnable Fibre Partition	= 0.00230 per six Pack	per six Pack
(including cost + brewery labor + return freight)		
Total	= 0.19770 per six Pack	per six Pack

[fol. 250]

Comparison of Packaging Costs

Tray Pack Cans	0.25880 per six pack	per six pack
New Non-Returnable Bottle in Tray	0.19770 per six pack	per six pack
Platform Differential	0.06120 per six pack	per six pack
17% Distributors Mark-up	0.01180 per six pack	per six pack
Difference at Distributors Level	0.07300 per six pack	per six pack
25% Retail Mark-up	0.01825 per six pack	per six pack
Difference at Retail Level	0.09125 per six pack	per six pack

[fol. 251]

Packaging Material Costs

12 oz. Flat Top Cans in 175 lb. 48 Pack Regular Slotted Construction

2 Color Cans (30.03/M) (...../M)	=0.18 per six Pack	..... per six Pack
Lids (6.24/M) (...../M)	=0.037 per six Pack	..... per six Pack
2 Color Regular Slotted Construction (115.00/M) (...../M)	=0.014 per six Pack	..... per six Pack
2 Color 6-Pack (27.00/M) (...../M)	=0.027 per six Pack	..... per six Pack
Total	=0.258 per six Pack	..... per six Pack

[fol. 252]

Comparison of Packing Costs

48 Pack Cans	0.25800 per six pack	..... per six pack
New Non-Returnable Bottle in Tray	0.19770 per six pack	..... per six pack
Platform Differential	0.06030 per six pack	..... per six pack
17% Distributors Mark-up	0.01025 per six pack	..... per six pack
Difference at Distributors Level	0.07055 per six pack	..... per six pack
25% Retail Mark-up (20% on selling price = 25% on cost)	0.01764 per six pack	..... per six pack
Difference at Retail Level	0.08819 per six pack	..... per six pack

[fol. 253]

Comparison of Packaging Costs

48 Pack Cans	0.25800 per six pack	..... per six pack
New Non-Returnable Bottle in Special Case	0.20390 per six pack	..... per six pack
Platform Differential	0.05410 per six pack	..... per six pack
17% Distributors Mark-up	0.00920 per six pack	..... per six pack
Difference at Distributor Level	0.06330 per six pack	..... per six pack
25% Retail Mark-up (20% on selling price = 25% on cost)	0.01577 per six pack	..... per six pack
Difference at Retail Level	0.07907 per six pack	..... per six pack

[fol. 254]

Returnable 055 Fibre Partition

Cost

50.00 per thousand + 25 trips + 4
..... per thousand + ... trips + 4

= 0.0005 per six pack

Break Labor

3.00 per hour + 750 cases per hour + 4 six packs
..... per hour + ... cases per hour + 4 six packs

= 0.001 per six pack

Return Freight

99.00 per 100 miles + 30 thousand partitions + 4
..... per 100 miles + ... thousand partitions + 4

= 0.0008 per six pack

Total Partition Cost

= 0.0023 per six pack

[fol. 255]

Comparison of Packaging Costs

Tray Pack Cans

0.25890 per six pack

per six pack

New Non-Returnable Bottle in Special Case

0.20390 per six pack

per six pack

Platform Differential

0.05500 per six pack

per six pack

17% Distributors Mark-up

0.00935 per six pack

per six pack

Difference at Distributor Level

0.06435 per six pack

per six pack

25% Retail Mark-up

0.01609 per six pack

per six pack

Difference at Retail Level

0.08044 per six pack

per six pack

1907

GLASS CONTAINER MANUFACTURERS INSTITUTE

MARKET RESEARCH & PROMOTION DIVISION

gm

BB-#15
July 7, 1958To the Beer Bottle Manufacturers

Subject: Trends in Beer Packaging

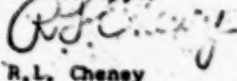
Gentlemen:

Enclosed is a chart showing graphically the trends in beer packaging as between returnable bottles, one-ways and cans.

You will note that returnable bottles continue to lose position and that most of their loss has moved into cans although 1956 and 1957 showed some leveling off in this trend toward cans and some small improvement in the position of one-way bottles.

We do not have data on quart bottles and so the position of glass may be somewhat better than this chart shows.

Sincerely,



R.L. Cheney

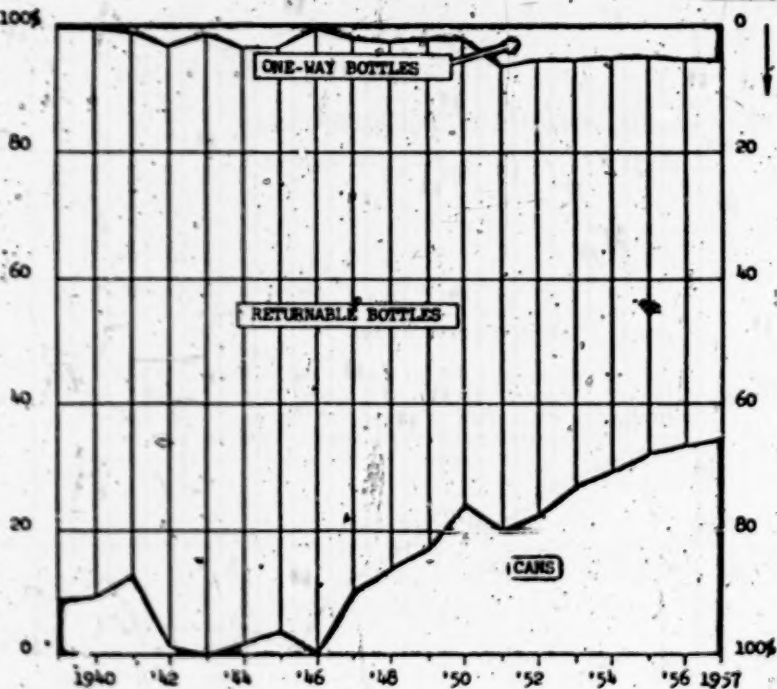
Enclosure.

TRENDS IN BEER PACKAGING
ONE-WAY BOTTLES vs. CANS

THEIR SHARE OF THE MARKET

CANS

ONE-WAY



1909

GLASS CONTAINER MANUFACTURERS



INSTITUTE Inc.

BB-76

January 29, 1957

To the Beer Bottle ManufacturersONE WAY BEER SALES IN VIRGINIA

Gentlemen:

We have just received our first report from the Virginia Alcoholic Beverage Control Board, of actual sales of beer in No Deposit bottles in that state. In their letter of January 21, 1957, they define these data (shown below) as:

"a tabulation of beer sales in cases by container types for the months of July, August, and September, 1956. This tabulation is 99% complete and is based on monthly reports to us by licensed Virginia distributors."

COMMONWEALTH OF VIRGINIA
Case Sales of Beer by Container Types
July - August - September, 1956

	<u>Non-Ret.</u>	<u>%</u>	<u>Ret.</u>	<u>%</u>	<u>Cans</u>	<u>%</u>	<u>Total</u>
July	59,726	4.0	502,080	33.6	931,855	62.4	1,493,661
August	69,658	4.8	501,582	35.0	862,613	60.2	1,433,853
September	56,334	5.1	413,132	37.6	630,379	57.3	1,099,845
Totals	185,718	4.6	1,416,794	35.2	2,424,847	60.2	4,027,359

For comparison we summarize on the attached sheet data previously sent you, covering earlier periods when No Deposit bottles were not permitted in Virginia.

Sincerely,

R. L. Cheney

Attachment,

1910

Glass

Page 2

BB-76

January 29, 1957

COMMONWEALTH OF VIRGINIA
RELEASE OF CROWNS AND CAN LIDS BY
VIRGINIA TAX COMMISSIONER FOR SALES OF MALT BEVERAGES

* July - August - September, 1955

	<u>CROWNS(In Gross)</u>	<u>CAN LIDS(In-Gross)</u>	<u>TOTAL</u>
July	102,350 45.6%	122,143 54.6%	224,493
August	62,110 31.9%	132,837 68.1%	194,947
September	77,887 35.4%	129,012 63.6%	202,899
Totals	238,347 38.3%	383,992 61.7%	622,339

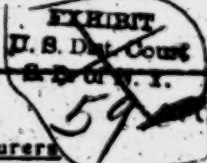
Year Ending

June 30, 1954.	1,211,432 52.2%	1,107,860 47.8%	2,319,292
June 30, 1955	1,061,218 46.8%	1,206,664 53.2%	2,267,882
June 30, 1956	1,040,303 43.6%	1,357,690 56.4%	2,406,993

Note: CROWNS shown went on returnable bottles except for some
No-deposits sold to Armed Services installations, as
No-deposits were not permitted in Virginia before July, 1956.

* From Ford Sampls & Co. letter of July 23, 1956
** From H. W. Muni's letter to Beer Bottle Manufacturers of
August 9, 1956

1911

GLASS CONTAINER MANUFACTURERSBB-77
March 27, 1957**INSTITUTE INC.**

to the Beer Bottle Manufacturers

ONE WAY BEER SALES IN VIRGINIA

Gentlemen:

From the Virginia Alcohol Beverage Control Board we have just received the figures shown below for the months of October, November and December, 1956:

COMMONWEALTH OF VIRGINIA
Case Sales of Beer by Container Types
October - November - December, 1956

	<u>Non-Ret.</u>	<u>%</u>	<u>Ret.</u>	<u>%</u>	<u>Cans</u>	<u>%</u>	<u>Total</u>
October	68,021	6.2	416,031	37.6	621,104	56.2	1,105,156
November	49,545	5.2	376,310	39.2	534,169	55.6	960,024
December	<u>51,929</u>	<u>5.2</u>	<u>384,571</u>	<u>38.3</u>	<u>566,569</u>	<u>56.5</u>	<u>1,003,069</u>
Total	169,495	5.5	1,176,912	38.4	1,721,842	56.1	3,068,249

We repeat here the figures for July, August and September given you in Bulletin BB-76 dated January 29, 1957:

July	59,726	4.0	502,080	33.6	931,855	62.4	1,493,661
August	69,656	4.8	501,582	35.0	862,613	60.2	1,433,853
September	<u>56,334</u>	<u>5.1</u>	<u>413,132</u>	<u>37.6</u>	<u>630,379</u>	<u>57.3</u>	<u>1,099,845</u>
Total	185,718	4.6	1,416,794	35.2	2,424,847	60.2	4,027,359
5 Months Total	355,213	5.0	2,593,706	36.6	4,146,689	58.4	7,095,608

As before, these represent a tabulation of beer sales in cases from virtually all licensed Virginia distributors.

For comparison we summarize on the attached sheet data previously sent you covering earlier periods when No-Deposit bottles were not permitted in Virginia.

Sincerely,

R. L. Cheney

Attachment.



1912

BB-#7

March 27, 1957

Page 2.

COMMONWEALTH OF VIRGINIA
RELEASE OF CROWNS AND CAN LIDS BY
VIRGINIA TAX COMMISSIONER FOR SALES OF MALT BEVERAGES

July - August - September, 1955

	<u>CROWNS (In Gross)</u>		<u>CAN LIDS (In Gross)</u>		<u>TOTAL</u>
Total	238,347	38.3%	383,992	61.7%	622,339

October - November - December, 1955

Total	200,295	49.1%	207,584	50.9%	407,879
-------	---------	-------	---------	-------	---------

6 Months

Total	438,642	42.6	591,576	57.4	1,030,218
-------	---------	------	---------	------	-----------

Year Ending

June 30, 1954	1,211,432	52.2%	1,107,860	47.8%	2,319,292
---------------	-----------	-------	-----------	-------	-----------

June 30, 1955	1,061,218	46.8%	1,206,664	53.2%	2,267,882
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June 30, 1956	1,049,303	43.6%	1,357,690	56.4%	2,406,993
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Note: CROWNS shown went on returnable bottles except for some
No-deposits sold to Armed Services installations, as
No-deposits were not permitted in Virginia before July, 1956.

- * From Ford Sammis & Co. letter of July 23, 1956
- ** From H. W. Kuni's letter to Beer Bottle Manufacturers of August 9, 1956.

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GLASS CONTAINER MANUFACTURERS**INSTITUTE inc.**

BB-78

June 3, 1957

To the Beer Bottle ManufacturersONE WAY BEER SALES IN VIRGINIA

Gentlemen:

From the Virginia Alcoholic Beverage Control Board we have recently received the figures shown below for the months of January, February and March, 1957:

COMMONWEALTH OF VIRGINIA
Case Sales of Beer by Container Types
January - February - March, 1957

	<u>Non-Ret.</u>	<u>%</u>	<u>Ret.</u>	<u>%</u>	<u>Cans</u>	<u>%</u>	<u>Total</u>
January	44,516	5.4	316,045	38.4	461,846	56.2	822,407
February	44,721	5.6	306,413	38.0	454,167	56.4	805,301
March	<u>51,828</u>	<u>6.0</u>	<u>322,711</u>	<u>37.5</u>	<u>485,438</u>	<u>56.5</u>	<u>859,977</u>
Total	141,065	5.7	945,169	38.0	1,401,451	56.3	2,487,685

Figures covering earlier periods were as follows:

3rd Quar. 1956	185,718	4.6	1,416,794	35.2	2,424,847	60.2	4,027,359
4th Quar. 1956	169,495	5.5	1,176,912	38.4	1,721,842	56.1	3,068,249

As before, these represent a tabulation of beer sales in cases from virtually all licensed Virginia distributors.

Sincerely
R. L. Cheney
 R. L. Cheney

GLASS CONTAINER MANUFACTURERS



INSTITUTE INC.

BB-713

August 29, 1957

To the Beer Bottle Manufacturers

ONE WAY BEER SALES IN VIRGINIA

Gentlemen:

From the Virginia Alcoholic Beverage Control Board we have recently received the figures shown below for the first six months of 1957:

COMMONWEALTH OF VIRGINIA
Case Sales of Beer by Container Types

1957	Non-Ret.	%	Ret.	%	Cans	%	Total
January	44,516	5.4	316,045	38.4	461,846	58.2	822,407
February	44,721	5.6	306,413	38.0	454,167	56.4	805,301
March	51,828	6.0	322,711	37.5	485,438	56.5	859,977
1st Quarter	141,065	5.7	945,169	38.0	1,401,451	56.3	2,487,685
April	57,661	6.0	332,676	34.4	576,221	59.6	966,558
May	91,190	7.7	360,940	30.6	726,951	61.7	1,179,081
June	58,459	6.0	310,037	31.9	603,484	62.1	971,980
2nd Quarter	207,310	6.6	1,003,653	32.2	1,906,656	61.2	3,117,619
Total	348,375	6.2	1,948,822	34.8	3,308,107	59.0	5,605,304

Figures covering earlier periods were as follows:

3rd Quarter							
1956	185,718	4.6	1,416,794	35.2	2,424,847	60.2	4,027,359
4th Quarter							
1956	169,495	5.5	1,176,912	38.4	1,721,842	56.1	3,068,249

As before, these represent a tabulation of beer sales in cases from virtually all licensed Virginia distributors.

Sincerely,

R. L. Cheney

1915

GLASS CONTAINER MANUFACTURERS INSTITUTE

gm

MARKET RESEARCH & PROMOTION DIVISION

Industry Letter #5D-14
November 24, 1958To the Soft Drink Bottle ManufacturersSOFT DRINK CAN STATISTICS

Attached is a table showing Department of Commerce figures on short tons of tinplate used in the manufacture of soft drink cans for the first nine months of 1958 compared with the same period in 1957 and 1956.

These data are also shown in graphic form.

On the basis of investigations made in the field by certain of our member companies we estimate that approximately 50% of the soft drinks canned in this country are shipped offshore to Army PX, Navy ships stores, and similar installations.

Non-Returnable Bottle Shipments

Shipments of one-way soft drink bottles for the first nine months of 1958 total 1,041,000 gross and represented a decrease of about 0.6% below shipments for the same period of 1957.

R. L. Cheney, Executive Director
and Marketing Manager

Attachments.

1916

METAL CANS FOR SOFT DRINKSSHIPMENTS (in short tons of steel consumed)

Month	<u>Monthly</u>			<u>% Change 1956/57</u>	<u>Year-to-date</u>			<u>% Change 1956/57</u>
	1956	1957	1956		1956	1957	1956	
January	1790	1233	854	/45.2	1790	1233	854	/45.2
February	2525	1404	1263	/79.8	4315	2637	2117	/63.6
March	2981	2864	1880	/04.1	7296	5501	3997	/32.6
April	3049	3576	3986	-14.7	10345	9077	7963	/14.0
May	4569	3957	3710	/15.5	14914	13034	11693	/14.4
June	5222	4722	4670	/10.6	20136	17756	16363	/13.4
July	3846	5161	4013	-25.5	23982	22917	20376	/4.6
August	4060	4050	2670	/0.2	28042	26967	23046	/4.0
September	2757	2662	1414	/3.6	30799	29629	24460	/3.9
October		1732	1923			31361	26363	
November		1258	1096			32619	27479	
December		1124	950			33743	26429	

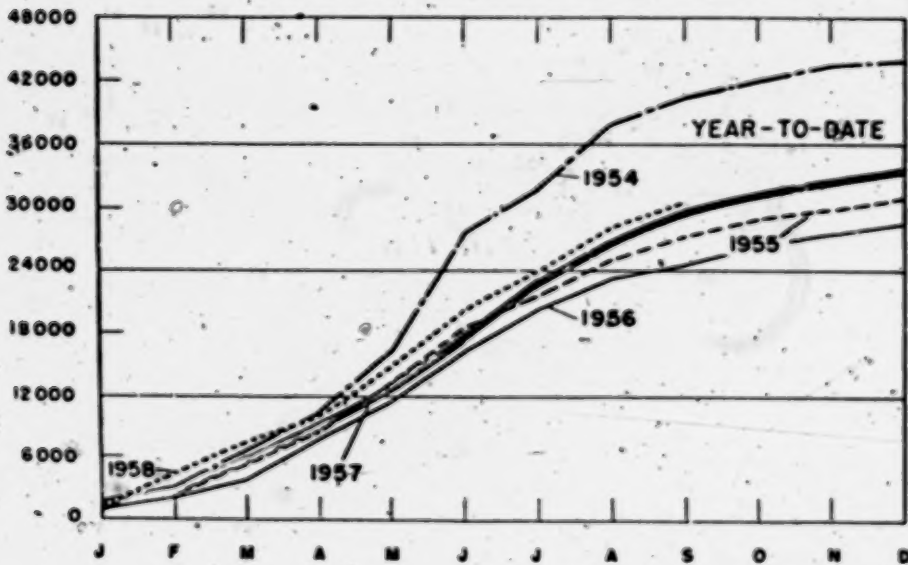
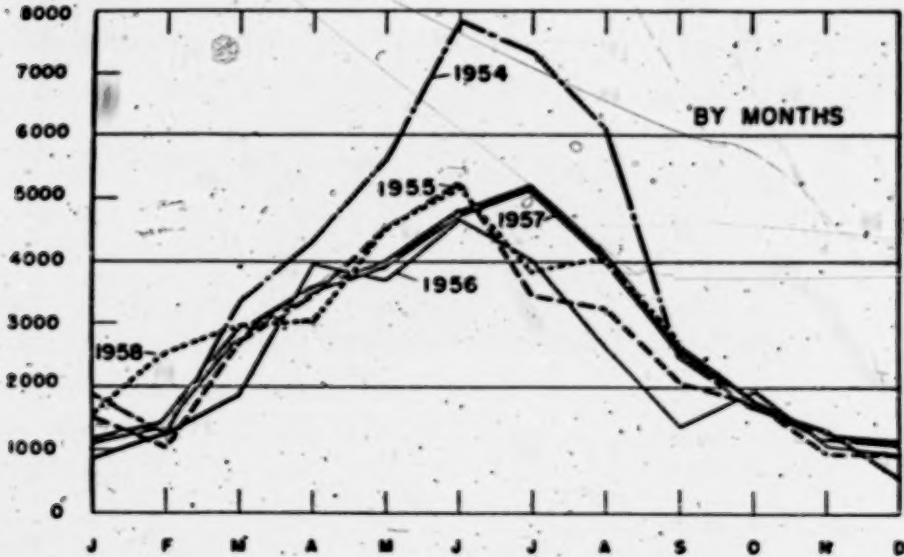
Source: U. S. Department of Commerce
Facts for Industry
Metal Cans

1917

[fol. 266]

SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL



SOURCE U. S. DEPARTMENT OF COMMERCE

GLASS CONTAINER MANUFACTURERS INSTITUTE

gm

MARKET RESEARCH & PROMOTION DIVISION

Industry Letter #SD-13
August 26, 1958To the Soft Drink Bottle ManufacturersSOFT DRINK CAN STATISTICS

Attached is a table showing Department of Commerce figures on short tons of tinplate used in the manufacture of soft drink cans for the first half of 1958 compared with the same period in 1957 and 1956.

These data are also shown in graphic form.

On the basis of investigations made in the field by certain of our member companies we estimate that approximately 50% of the soft drinks canned in this country are shipped offshore to Army PX, Navy ships stores, and similar installations.

Non-Returnable Bottle Shipments

Shipments of one-way soft drink bottles for the first half of 1958 total 678,000 gross and represented an increase of about 2% over shipments for the same period of 1957.

R. L. Cheney, Executive Director
and Marketing Manager

Attachments.

METAL CANS FOR SOFT DRINKS

1919

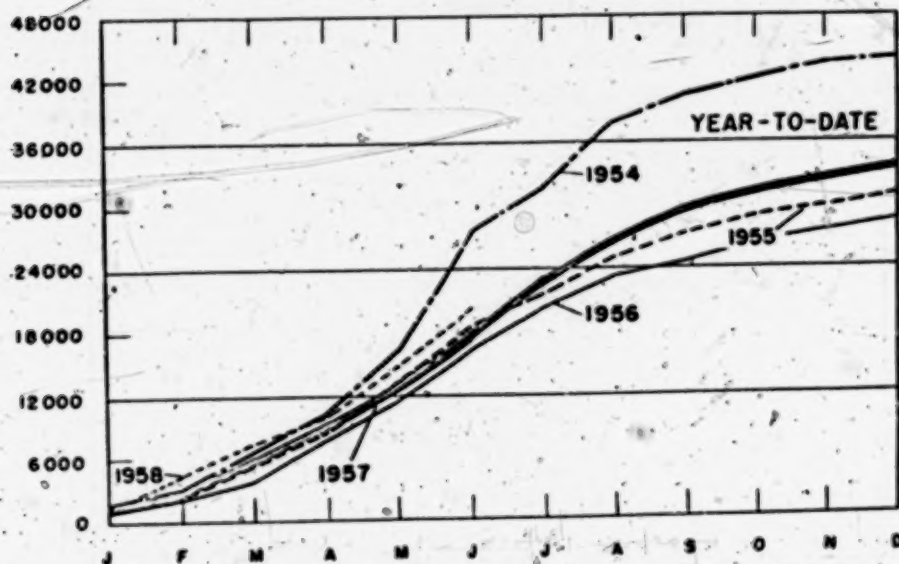
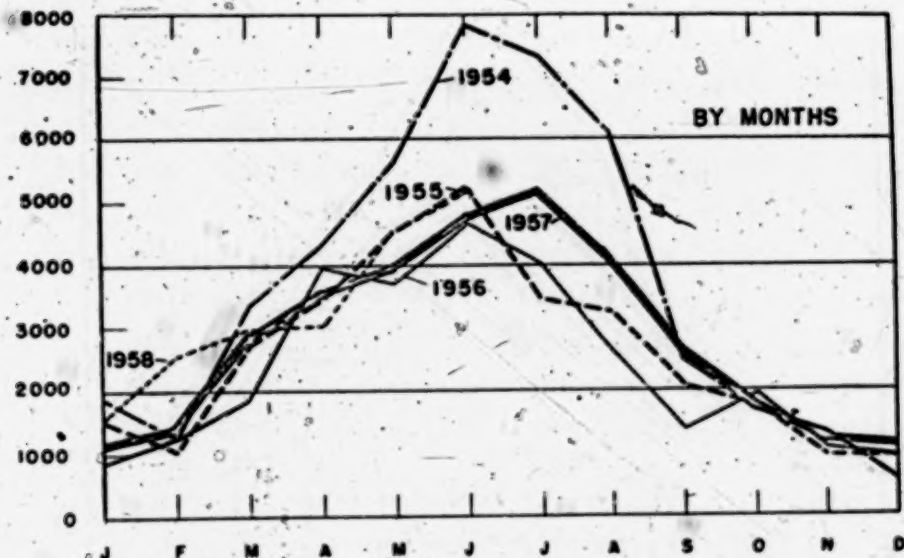
SHIPMENTS (in short tons of steel consumed)

Month	<u>Monthly</u>			<u>% Change 1956/57</u>	<u>Year-to-date</u>			<u>% Change 1956/57</u>
	1956	1957	1956		1956	1957	1956	
January	1790	1136	854	/57.6	1790	1136	854	/57.6
February	2525	1404	1263	/79.8	4315	2540	2117	/69.9
March	2981	2664	1880	/04.1	7296	5404	3997	/35.0
April	3049	3576	3986	-14.7	10345	8980	7983	/15.2
May	4569	3957	3710	/15.5	14914	12937	11693	/15.3
June	5222	4722	4670	/10.6	20136	17659	16363	/14.0
July		5161	4013			22820	20376	
August		4050	2670			26870	23046	
September		2662	1414			29532	24460	
October		1732	1923			31264	26383	
November		1258	1096			32522	27479	
December		1124	950			33646	28429	

Source: U. S. Department of Commerce
Facts for Industry
Metal Cans

1920

SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL

1921

GLASS CONTAINER MANUFACTURERS INSTITUTE

g.m.

MARKET RESEARCH & PROMOTION DIVISION

Industry Letter #SD-10
July 22, 1958To the Soft Drink Bottle Manufacturers

Gentlemen:

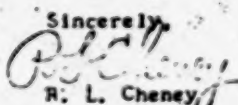
The attached report is sent to you at the suggestion of the Committee on Market Research and Promotion.

In view of the current activities in the promotion of canned beverages, the Committee felt you might find this useful in reminding your bottler customers of the heavy promotion which GCM continues to put behind carbonated beverages in glass bottles.

This is a very substantial "total impact" program, using a broad array of advertising, publicity and promotional tools, but directed to the right targets; and it represents spending where it counts. It has the cumulative effect of being in the fourth continuous year of activity.

Extra copies of the report are available.

Sincerely,


R. L. Cheney

Attachment.

[fol. 271] 1922

GLASS CONTAINER MANUFACTURERS INSTITUTE

MARKET RESEARCH & PROMOTION DIVISION

g m

A
SUMMARY
of the
G C M I

1958

Continuous National Program

Designed to strengthen the
already overwhelming preference
for

SOFT DRINKS IN GLASS BOTTLES

1923

GLASS CONTAINER MANUFACTURERS INSTITUTE**MARKET RESEARCH & PROMOTION DIVISION****gm**Industry Letter #SD-8
June 2, 1958To the Soft Drink Bottle ManufacturersSOFT DRINK CAN STATISTICS

Attached is a table showing Department of Commerce figures on short tons of tinplate used in the manufacture of soft drink cans for the first quarter of 1958 compared with the first quarter of 1957 and 1956.

These have also been plotted on graphs showing 1954 as well, for your information.

Non-Returnable Bottles Growing

Shipments of one-way soft drink bottles for the first quarter of 1958 were 16.3% over first quarter of 1957.

R. L. Cheney, Executive Director
and Marketing Manager

Attachments.

[601.273] 1924

METAL CANS FOR SOFT DRINKS

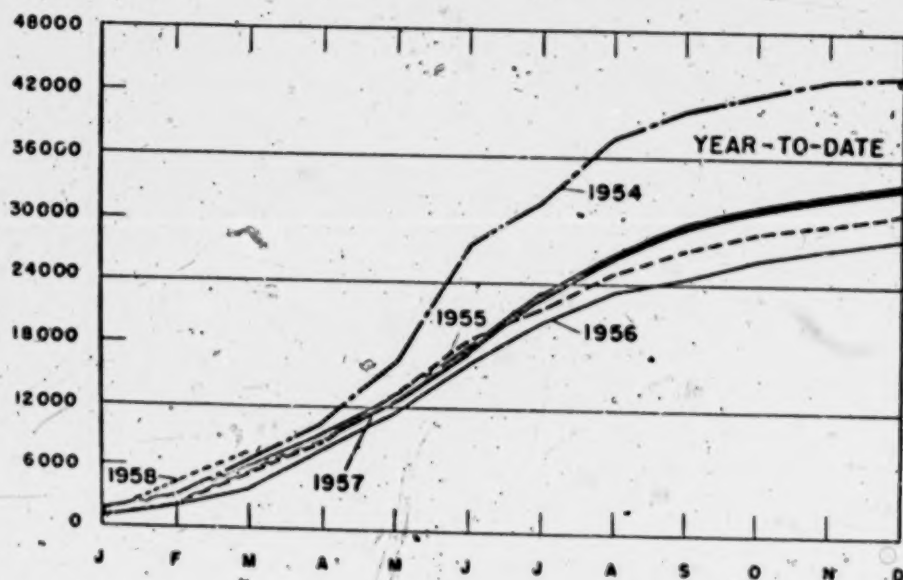
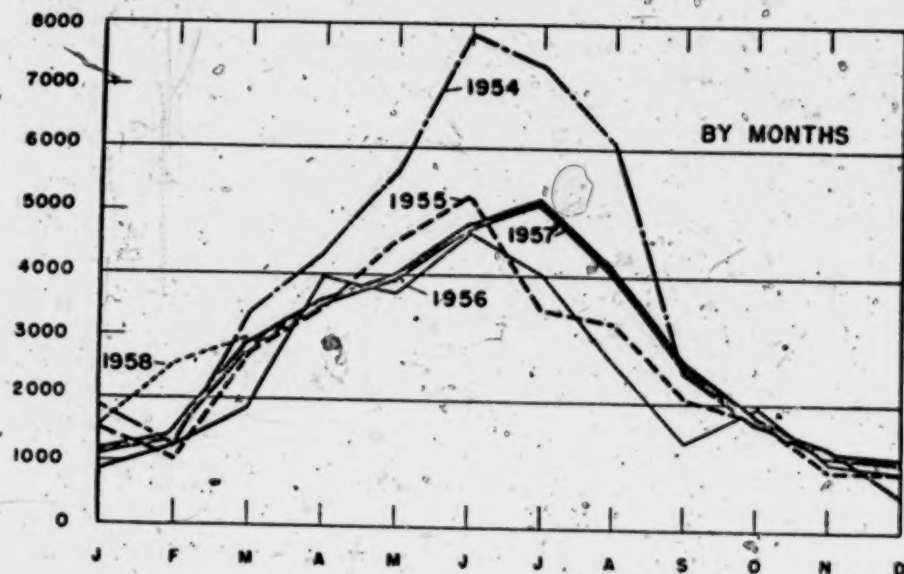
SHIPMENTS (in short tons of steel consumed)

Month	Monthly			% Change 1958/57	Year-to-date			% Change 1958/57
	1958	1957	1956		1958	1957	1956	
January	1790	1136	854	/57.6	1790	1136	854	/57.6
February	2525	1404	1263	/79.8	4315	2540	2117	/69.9
March	2981	2864	1880	/64.1	7296	5404	3997	/35.0
April		3526	3986			8980	7983	
May		3957	3710			12937	11693	
June		4722	4670			17659	16363	
July		5161	4013			22820	20376	
August		4050	2670			26670	23046	
September		2662	1414			29532	24460	
October		1732	1923			31264	26383	
November		1258	1096			32522	27479	
December		1124	950			33646	28429	

Source: U. S. Department of Commerce
Facts for Industry
Metal Cans

1925

SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL

GLASS CONTAINER MANUFACTURERS INSTITUTE

MARKET RESEARCH & PROMOTION DIVISION

gm

Industry Letter #SD-7
March 12, 1958To the Soft Drink Bottle ManufacturersSOFT DRINK CAN STATISTICS

Attached is a table showing Department of Commerce figures on short tons of tinplate used in the manufacture of soft drink cans for 1957 compared with the years 1956 and 1955.

These have also been plotted on graphs showing 1954 as well, for your information.

Non-Returnable Bottles Growing

Shipments of one-way soft drink bottles for 1957 were 7.2% over 1956.

R. L. Cheney, Executive Director
and Marketing Manager

Attachments.

[Vol. 26]

METAL CANS FOR SOFT DRINKS

1927

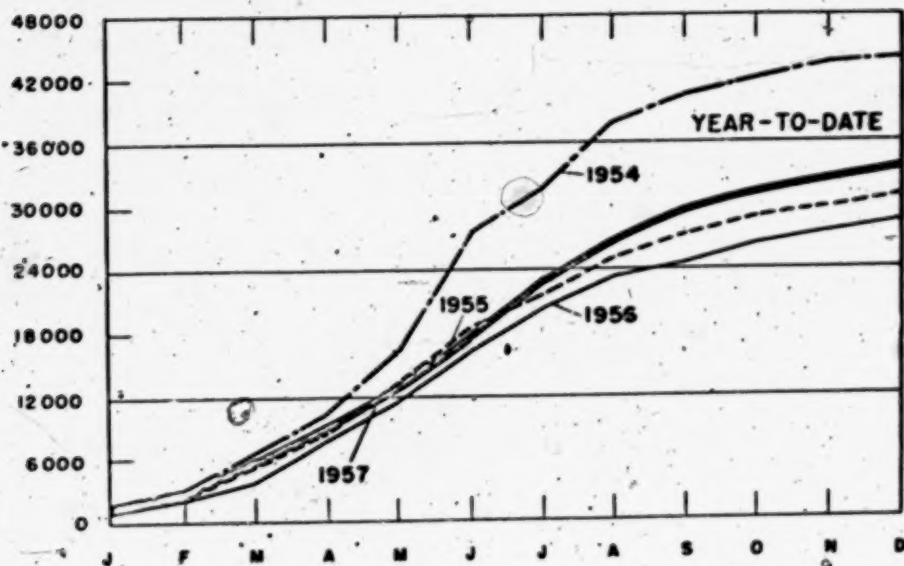
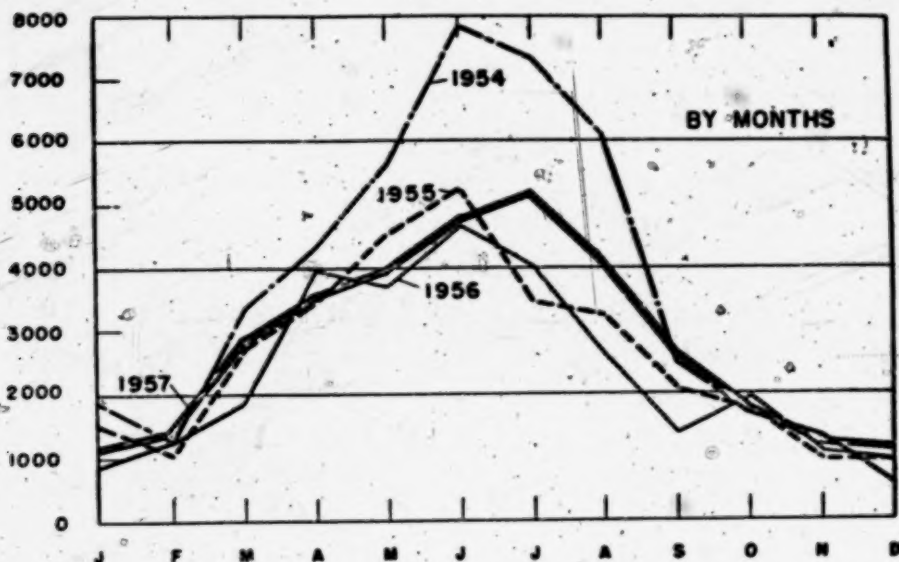
SHIPMENTS (in short tons of steel consumed)

Month	Monthly			% Change 1957/56	Year-to-date			% Change 1957/56
	1957	1956	1955		1957	1956	1955	
January	1136	854	1522	/33.0	1136	854	1522	/33.0
February	1404	1263	1020	/11.2	2540	2117	2542	/20.0
March	2864	1880	2707	/52.3	5404	3997	5249	/35.2
April	3576	3986	3446	-10.3	8980	7983	8695	/12.5
May	3957	3710	4514	/6.7	12937	11693	13209	/10.6
June	4722	4670	5223	/1.1	17659	16363	18432	/7.9
July	5161	4013	3441	/28.6	22820	20376	21873	/12.0
August	4050	2670	3237	/51.7	26870	23046	25110	/16.6
September	2652	1414	2081	/88.3	29532	24460	27191	/20.7
October	1732	1923	1752	-9.9	31264	26383	28943	/18.5
November	1258	1096	922	/14.8	32522	27479	29865	/18.4
December	1124	950	945	/18.3	33646	28429	30810	/18.4

Source: U. S. Department of Commerce
Facts for Industry,
Metal Cans

1928 SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL



SOURCE U.S. DEPARTMENT OF COMMERCE

1929

GLASS CONTAINER MANUFACTURERS**INSTITUTE INC.**

Industry Letter #SD-6
August 13, 1957

To the Soft Drink Bottle Manufacturers.

SOFT DRINK CAN STATISTICS

Attached is a table showing Department of Commerce figures on short tons of tinplate used in the manufacture of soft drink cans for the first half of 1957 compared with the first half of 1956 and 1955.

These have also been plotted on graphs showing 1954 as well, for your information.

1957 Beverage Can Sales Leveling Off

The earlier gains over 1956 were not sustained in the second quarter, and shipments for the first six months stand at 7.9% above 1956, and somewhat below 1955.

Non-Returnable Bottles Growing

Shipments of One-Way soft drink bottles for the first six months of 1957 were 8.5% over 1956.

Returnables showed further gains in July, reducing the lag behind 1956 for the first six months to 12.3%.

R. L. Cheney, Director
Market Research and Promotion

Attachments.

1930

METAL CANS FOR SOFT DRINKS

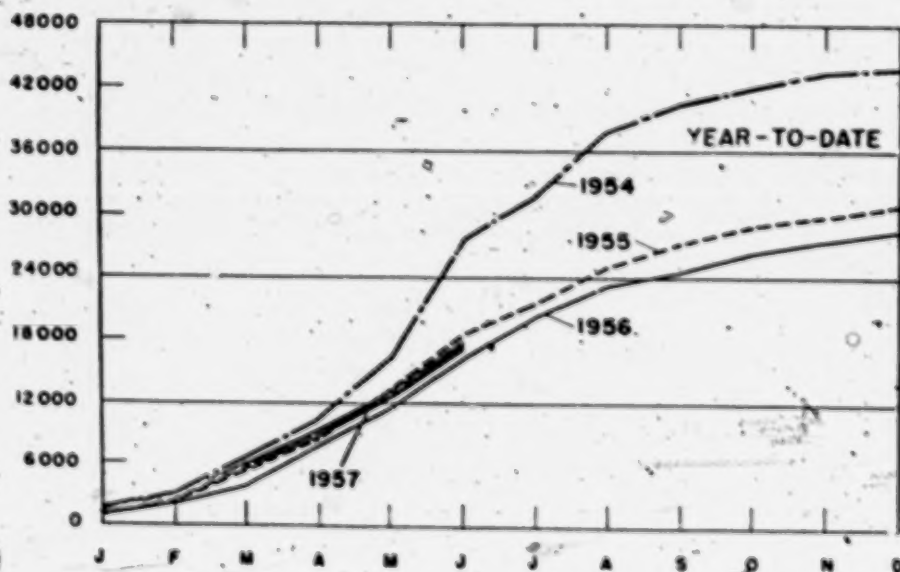
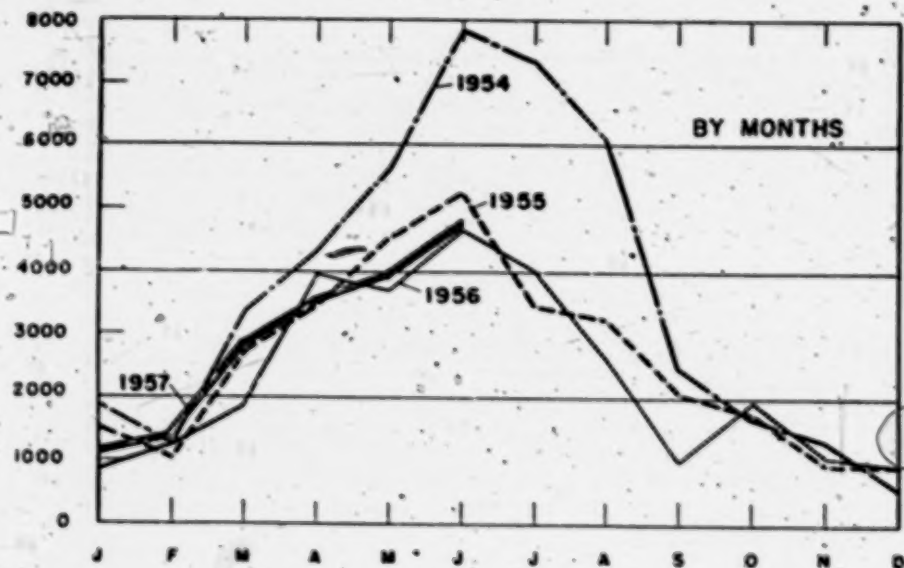
SHIPMENTS. (in short tons of steel consumed)

Month	Monthly			% Change 1957/56	Year-to-date			% Change 1957/56
	1957	1956	1955		1957	1956	1955	
January	1136	854	1522	/33.0	1136	854	1522	/33.0
February	1404	1263	1020	/11.2	2540	2117	2542	/20.0
March	2364	1880	2707	/52.3	5404	3997	5249	/35.2
April	3576	3986	3446	-10.3	8980	7283	8695	/12.5
May	3957	3710	4514	/ 6.7	12937	11693	13209	/10.6
June	4722	4670	5223	/ 1.1	17659	16363	18432	/ 7.9
July		4013	3441			20376	21873	
August		2670	3237			23046	25110	
September		1414	2081			24460	27191	
October		1923	1752			26383	28943	
November		1096	922			27479	29865	
December		950	945			28429	30810	

Source: U. S. Department of Commerce
Facts for Industry
Metal Cans

1931

SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL

SOURCE: U. S. DEPARTMENT OF COMMERCE

1932^s

[fol. 281]

GOVERNMENT'S EXHIBIT 68

GLASS CONTAINER MANUFACTURERS



INSTITUTE INC.

Industry Letter #SD-5
June 6, 1957

To the Soft Drink Bottle Manufacturers

SOFT DRINK CAN STATISTICS

Attached is a table showing Department of Commerce figures on short tons of tinplate used in the manufacture of soft drink cans for the first quarter of 1957 compared with the first quarter of 1956 and 1955.

These have also been plotted on graphs showing 1954 as well, for your information.

1957 Shows Upturn in Beverage Cans

You will note that for the first time in three years the sale of tin cans for carbonated beverages has turned upwards and for the first quarter of the year stands 35.2% above 1956.

Non-Returnable Glass Bottles Growing

For the first four months of 1957 one-way glass bottles for carbonated beverages are up 6.2% over 1956.

Returnable soft drink bottles are off 32.7% for the first four months although shipments started to pick up in April with a 17.7% gain over April 1956.

R. L. Cheney, Director
Market Research and Promotion

Attachments.

METAL CANS FOR SOFT DRINKS

1933

SHIPMENTS (in short tons of steel consumed)

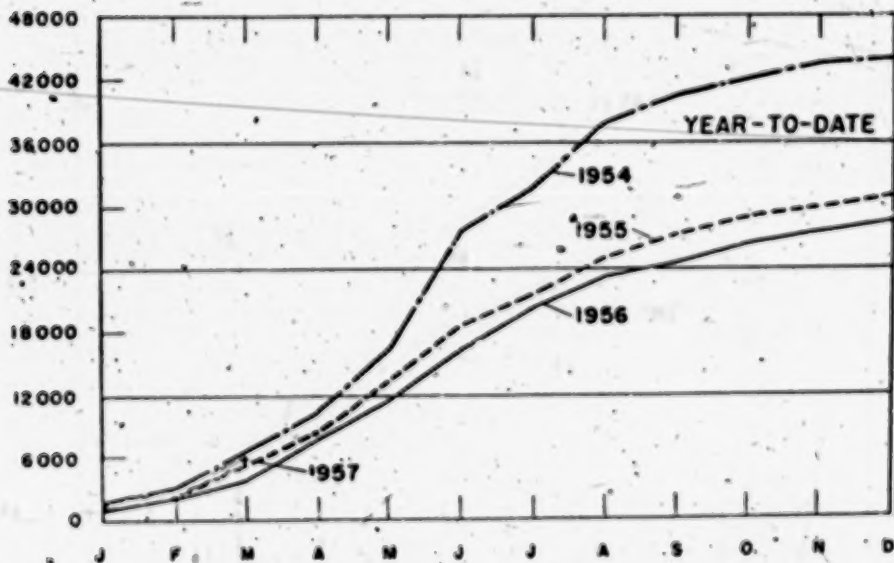
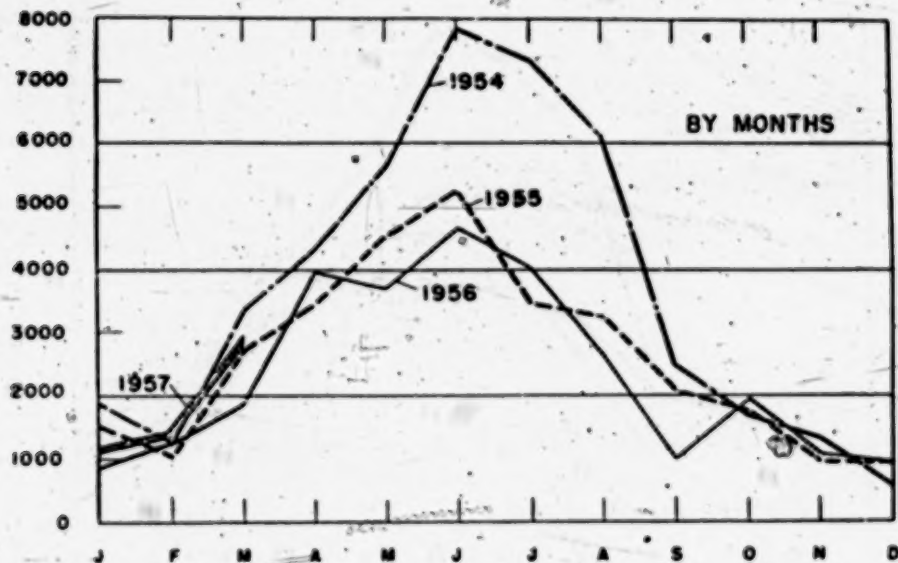
Month	Monthly			% Change 1957/56	Year-to-date			% Change 1957/56
	1957	1956	1955		1957	1956	1955	
January	1136	854	1522	/33.0	1136	854	1522	/33.0
February	1404	1263	1020	/11.2	2540	2117	2542	/20.0
March	2864	1880	2707	/52.3	5404	3997	5249	/35.2
April		3986	3446			7983	8695	
May		3710	4514			11693	13209	
June		4670	5223			16363	18432	
July		4013	3441			20376	21873	
August		2670	3237			23046	25110	
September		1414	2081			24460	27191	
October		1923	1752			26383	28943	
November		1096	922			27479	29865	
December		950	945			28429	30810	

Source: U. S. Department of Commerce
Facts for Industry
Metal Cans

{fol. 283} 1934

SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL



SOURCE U.S. DEPARTMENT OF COMMERCE

1935

GLASS CONTAINER MANUFACTURERS**INSTITUTE inc.**Industry Letter #SD-4
March 1, 1957To the Soft Drink ManufacturersSOFT DRINK CAN STATISTICS

Attached is a table showing Department of Commerce figures on short tons of tinplate used in the manufacture of soft drink cans for the year 1956 compared with 1955.

These have also been plotted on graphs showing 1954 as well, for your information.

1956 Shows Continued Decline in Beverage Cans

It will be noted that use of tinplate for carbonated beverage cans for the year 1956 represents a decline of 7.9% compared to 1955, and a 35.2% decline compared to 1954.

Non-Returnable Glass Bottles Holding Their Own

Shipments of one-way glass bottles for carbonated beverages were up 0.9% in 1956 over 1955, and 23.4% over 1954.

Returnable soft drink bottles continue to show gains, 1956 being 7.9% above 1955, and 46.6% above 1954.

R. L. Cheney, Director
Market Research and Promotion

Attachments.

1936

[fol. 285]

METAL CANS FOR SOFT DRINKS

SHIPMENTS (in short tons of steel consumed)

Month	Monthly		% Change	Year-to-date		% Change
	1956	1955		1956	1955	
January	832	1522	-45.3	832	1522	-45.3
February	1249	1020	+22.5	2081	2542	-18.1
March	1876	2707	-30.7	3957	5249	-24.6
April	3965	3446	+15.1	7922	8695	-8.9
May	3710	4514	-17.8	11632	13209	-11.9
June	4670	5223	-10.6	16302	18432	-11.6
July	4013	3441	+16.6	20315	21875	-7.1
August	2670	3237	-17.5	22985	25110	-8.5
September	1414	2081	-32.1	24399	27191	-10.3
October	1923	1752	+9.8	26322	28943	-9.1
November	1096	922	+18.9	27418	29865	-8.2
December	950	945	+0.5	28368	30810	-7.9

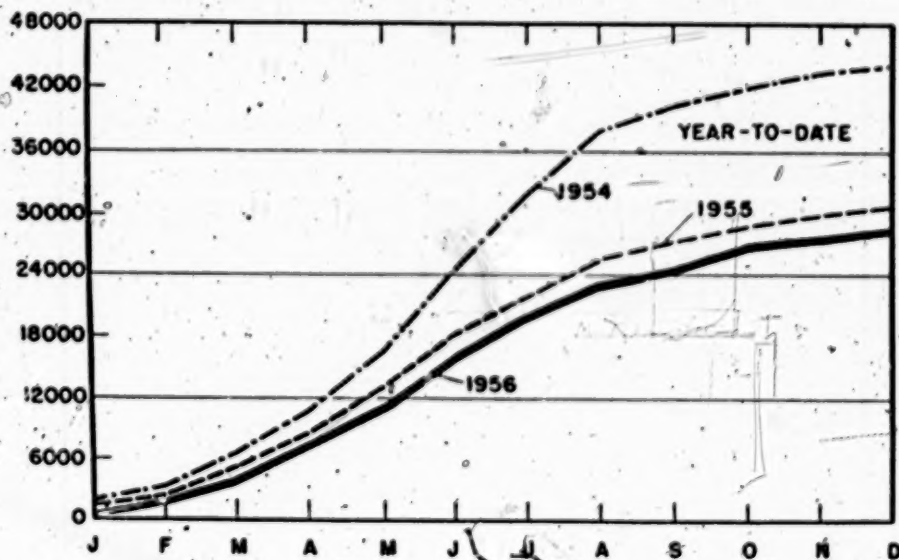
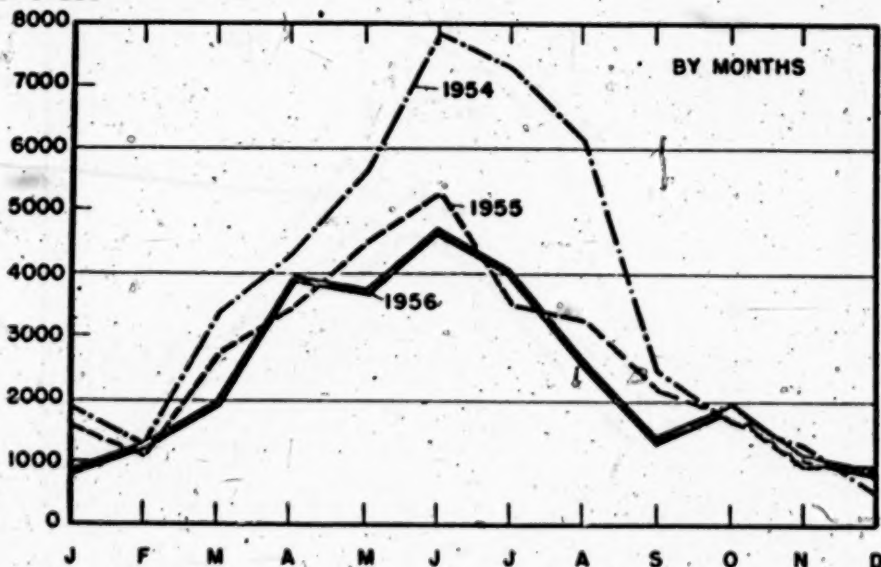
Source: U. S. Department of Commerce
Facts for Industry
Metal Cans

1937

[fol. 286]

SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL



SOURCE:—U.S. DEPARTMENT OF COMMERCE

GLASS CONTAINER MANUFACTURERS**INSTITUTE inc.**Industry Bulletin #28
October 26, 1955SOFT DRINK CAN STATISTICS

Starting with May of this year the Department of Commerce has been giving monthly statistics of tin plate used in the manufacture of soft drink cans. These appear in "Facts for Industry - Metal Cans." (Series M75D) Corresponding months of last year and year-to-date figures are shown.

1955 Shows Marked Decline in Beverage Cans

Figures just received for August show soft drink can shipments to be down 47.2% from August 1954; and year-to-date, down 33.6% from last year.

Glass Bottles Show Gain

Conversely, shipments of one-way glass bottles for soft drinks were up 74.5% in August over August 1954, and up 22.1% for the year-to-date.

Returnable bottles show even larger gains: 78.0% for the month and 34.0% for the year-to-date.

A tabulation of the beverage can figures is attached, along with a chart showing the trend.

R. L. Cheney, Director
Market Research and Promotion

Attachments.

METAL CANS FOR SOFT DRINKS

1939

SHIPMENTS (in short tons of steel consumed)

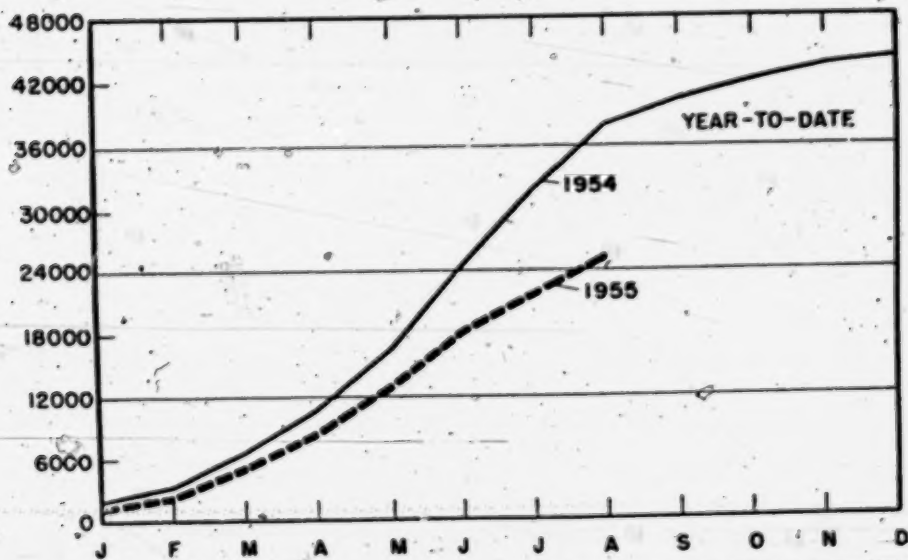
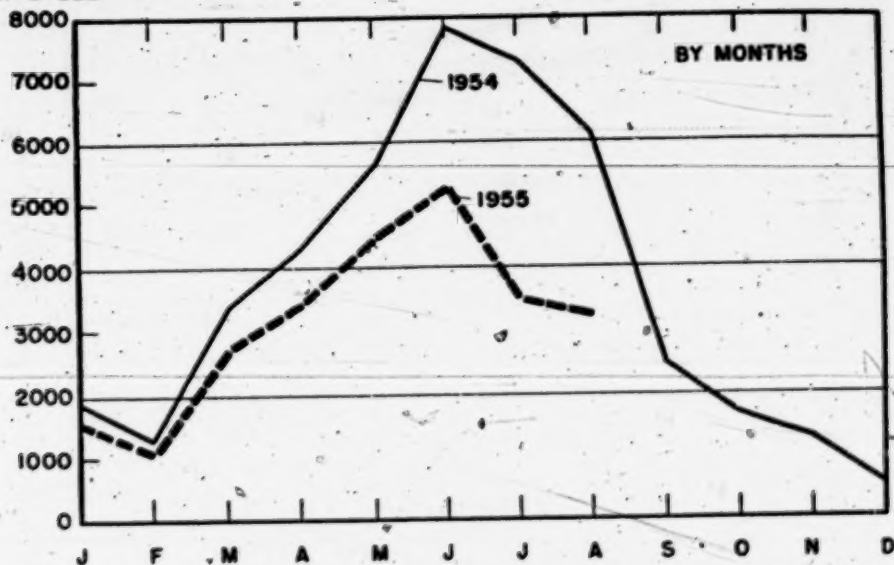
Month	Monthly		% Change	Year-to-date		% Change
	1955	1954		1955	1954	
January	1522	1894*		1522	1894*	
February	1020	1285*		2542	3179*	
March	2707	3384*		5249	6563*	
April	3446	4309*		8695	10872	-20.0%
May	4514	5636	-19.9%	13209	16508	-20.0%
June	5223	7041	-33.4%	18432	24349	-24.3%
July	3441	7356	-53.2%	21873	31705	-31.0%
August	3237	6126	-47.2%	25110	37831	-33.6%
September	6	2471			40302	
October		1695			41997	
November		1310			43307	
December		567			43874	

*Estimate

Source: U. S. Department of Commerce
Facts for Industry
Metal Cans

1940

SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL

SOURCE:—U.S. DEPARTMENT OF COMMERCE

1941

GLASS CONTAINER MANUFACTURERS**INSTITUTE INC.**Industry Bulletin #19
March 10, 1955CAN COMPANIESCARBONATED BEVERAGE PROGRAM

At a panel discussion held at the meeting of the Illinois Bottlers of Carbonated Beverages in Chicago on March 3, 1955, Mr. Arthur Staley of Continental Can Company made two announcements of interest.

He stated that final statistics showed that the number of carbonated beverage cans produced in 1954 was between 450,000,000 and 500,000,000 cans. If all had been filled, - and he inferred that they had not, - this would represent considerably less than 2% of the total soft drink business in 1954.

The other announcement which he made was to the effect that Continental Can Company, American Can Company, and the steel industry as a whole would announce within one month an extensive advertising program in support of carbonated beverage cans.

R. L. Cheney
Director
Market Research and Promotion

1942

[fol. 291]

GOVERNMENT'S EXHIBIT 72

GLASS CONTAINER MANUFACTURERS



INSTITUTE INC.

Industry Bulletin #32
March 7, 1956

TREND TO SMALLER SIZES

We think the following excerpt from Len Kanter's column in the February 20 issue of FOOD TOPICS (page 41) to be worth your special attention:

NEW TASTE TREATS

Gradually, with the greater impetus on self-service, combined with new taste desires of our populace, plus a fast tempo of living and convenience, the shift in canned goods has been towards smaller sizes. Surely, every operator must take this shift of consumer desires into his planning for the size of gondolas and facings of the individual important vegetable items.

Canned goods which for some time had been taking a back seat in sales certainly can offer a continued profit for every operator, when we recognize that the canned goods department of every super is still the very base of our existence.

The advent and greater importance of the 8-ounce and 10-ounce can cannot be over emphasized. I know, and every statistical report will prove the one fact, that as we get to smaller and smaller units of cans, our profit structure improves. Who among us can fight with the combination of satisfying the consumer in stocking the smaller cans and thus also increase our operational profit?

In 1955, consumers spent an estimated 67 billion dollars for food. It is important to remember that in the same year the per capita consumption of canned vegetables jumped an important 38% over the years 1935-1939. Today, 6% of all canned vegetables are in 8-ounce cans, compared to a 3% figure registered only five years ago.

Gondola space, plus performance, plus service to consumers, add up to only one thing: the 8-ounce cans and 10-ounce cans are easily the two most important sizes to be considered in our canning marketing fervor.

1943

Glass

2.

Surely, the time is ripe for us to reconsider the entire stocking of our supers. Are we carrying the proper sizes not only of cans, but also the numerous products in glass? Perhaps, we are filling up our gondolas with products in sizes that do not warrant the space they presently occupy. The time of carrying items for variety only or to please a limited number of customers is past. It behooves us to closely reconsider every item of merchandise, in retrospect.

Glass containers should enjoy a substantial part of this expanding market for 8 and 10-ounce sizes in fruits, vegetables and specialty items. Perhaps your sales organizations will want to give this special attention.

R. L. Chehey, Director
Market Research and Promotion

1944

[fol. 293]

GOVERNMENT'S EXHIBIT 73

GLASS CONTAINER MANUFACTURERS



INSTITUTE INC.

Industry Bulletin #38
August 21, 1956

SOFT DRINK CAN STATISTICS

Attached is a table showing Department of Commerce figures on short tons of tinplate used in the manufacture of soft drink cans for the year 1956, to date, compared with 1955.

These have also been plotted on graphs showing 1954 as well, for your information.

1956 Shows Continued Decline in Beverage Cans

It will be noted that use of tinplate for carbonated beverage cans for the first six months of 1956 represents a decline of 11.6% compared to the same period for 1955, and a 33.1% decline compared to the same period for 1954.

Non-Returnable Glass Bottles Holding Their Own

For this same period, shipments of one-way glass bottles for carbonated beverages are virtually the same for the first six months of 1955 and are up 19.3% over the same period of 1954.

Returnable soft drink bottles continue to show gains, the first six months of 1956 being 12.7% above 1955 and 43.8% above 1954.

R. L. Cheney, Director
Market Research and Promotion

Attachments.

[fol. 294]

METAL CANS FOR SOFT DRINKS

1945

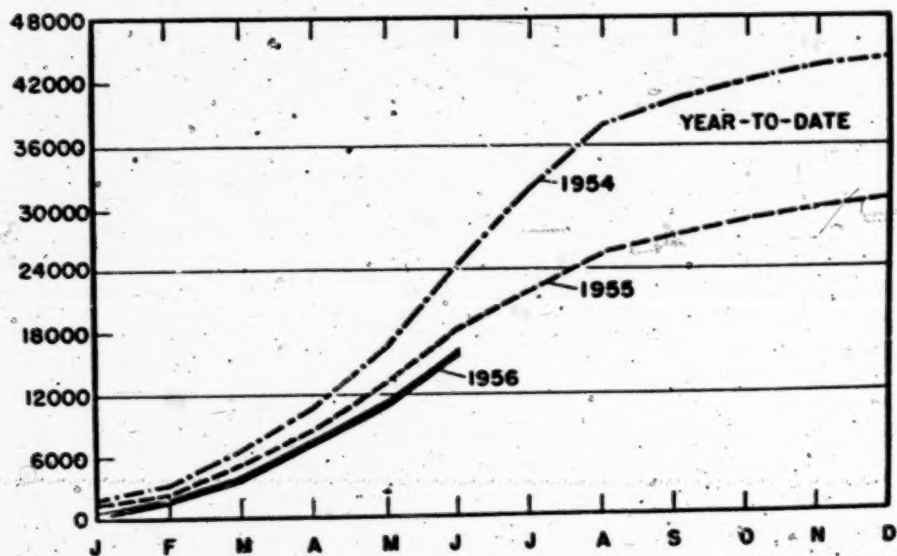
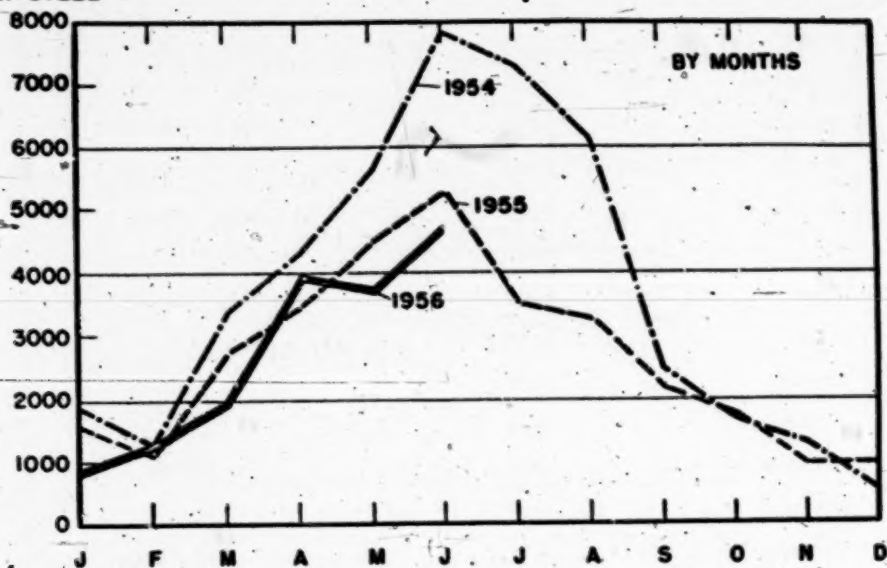
SHIPMENTS (in short tons of steel consumed)

Month	Monthly		% Change	Year-to-date		% Change
	1956	1955		1956	1955	
January	832	1522	-45.3	832	1522	-45.3
February	1249	1020	22.5	2081	2542	-18.1
March	1876	2707	-30.7	3957	5249	-24.6
April	3965	3446	15.1	7922	8695	-8.9
May	3710	4514	-17.8	11632	13209	-11.9
June	4670	5223	-10.6	16302	18432	-11.6
July		3441			21873	
August		3237			25110	
September		2081			27191	
October		1752			28943	
November		922			29865	
December		945			30810	

Source: U. S. Department of Commerce
Facts for Industry
Metal Cans

1946

SHIPMENTS: METAL CANS FOR SOFT DRINKS

SHORT TONS
OF STEEL

SOURCE: U.S. ASSISTANT SECRETARY OF COMMERCE

[fol. 296]

GOVERNMENT'S EXHIBIT 74

1947

CONTAINER MANUFACTURERS INSTITUTE, INC.

99 PARK AVENUE • NEW YORK 16, N. Y.
MURRAY HILL 2-8822

S-177
February 21, 1958

TO: The Industry
FROM: John B. Carroll
SUBJECT: Beer Container Trends--Year 1957.

National beer consumption in 1957 amounted to 84,353,800 barrels, approximately 1.0% below total beer consumption in 1956. While total packaged beer decreased fractionally from its 1955 total, draft beer was down 3.0% from the previous year.

Beer can shipments in 1957 amounted to 54,232,500 gross, an increase of 3.2% over 1956 shipments. Non-returnable beer bottle shipments totaled 8,494,000 gross, an increase of 3.2%. Returnable bottle shipments amounted to 2,343,000 gross, a decrease of 5.5% from the previous year's totals.

Nearly 35.0% of all packaged beer went into cans in 1957. Non-returnable bottles accounted for 5.4% of the total packaged market. Returnable bottle shipments accounted for the remainder, 59.8%.

In checking earlier annual reports, we have noted the following change in total packaged beer market participation.

Percentage of Packaged Market

<u>Period</u>	<u>Cans</u>	<u>Non-Returnable</u>	<u>Returnable</u>
Year 1951	20.6	6.8	72.6
Year 1957	34.8	5.4	59.8

JBC/dm

1948

COMPARISON OF PACKAGED AND DRAFT
BEER SALES IN THE U.S.A.

(in thousands of barrels of 31 gallons each)

PERIOD	PACKAGED	DRAFT	TOTAL	% PACKAGED	% DRAFT
Year 1955	66,179.0	18,793.3	84,972.3	77.9	22.1
Year 1956	67,087.0	17,921.1	85,008.1	78.9	21.1
% Change	+ 1.4	- 4.7			
1956					
January	4,369.5	1,255.9	5,625.4	77.7	22.3
February	4,487.7	1,314.9	5,802.6	77.3	22.7
March	5,070.2	1,420.2	6,490.4	79.1	20.9
1st Quarter	13,927.4	3,991.0	18,218.4	78.1	21.9
April	5,315.3	1,435.6	6,750.9	78.7	21.3
May	6,516.6	1,665.5	8,182.1	79.6	20.4
June	6,978.7	1,694.3	8,673.0	80.5	19.5
2nd Quarter	18,810.6	4,795.4	23,606.0	79.7	20.3
July	7,079.4	1,697.3	8,776.7	80.7	19.3
August	7,189.9	1,825.0	9,014.9	79.8	20.2
September	5,031.3	1,393.0	6,424.3	78.3	21.7
3rd Quarter	19,300.6	4,915.3	24,215.9	79.7	20.3
October	5,151.5	1,518.3	6,669.8	77.2	22.8
November	4,778.9	1,391.7	6,170.6	77.4	22.6
December	4,818.0	1,309.4	6,127.4	78.6	21.4
4th Quarter	14,748.4	4,219.4	18,967.8	77.8	22.2
Year 1956	67,087.0	17,921.1	85,008.1	78.9	21.1
1957					
January	4,464.3	1,224.6	5,688.9	78.5	21.5
February	4,329.6	1,240.5	5,570.1	77.7	22.3
March	5,118.7	1,319.9	6,438.6	79.5	20.5
1st Quarter	13,912.6	3,785.0	17,697.6	78.6	21.4
April	5,570.0	1,422.2	6,992.2	79.7	20.3
May	6,569.5	1,631.1	8,200.6	80.1	19.9
June	6,655.0	1,592.0	8,247.0	80.7	19.3
2nd Quarter	18,794.5	4,645.3	23,439.8	80.2	19.8
July	7,441.8	1,749.3	9,191.1	81.0	19.0
August	6,785.2	1,696.6	8,481.8	80.0	20.0
September	5,429.6	1,453.9	6,883.5	78.9	21.1
3rd Quarter	19,656.6	4,899.8	24,556.4	80.0	20.0
October	5,080.2	1,437.3	6,517.5	77.9	22.1
November	4,464.0	1,258.8	5,722.8	78.0	22.0
December	5,064.5	1,355.2	6,419.7	78.9	21.1
4TH Quarter	14,608.7	4,051.3	18,660.0	78.3	21.7
Year 1957	65,972.4	17,381.4	83,353.8	79.4	20.6
% Change Year	-0.2	-3.0	-0.8		

COMPARISON OF SHIPMENTS OF
SINGLE SERVICE & RETURNABLE CONTAINERS
WITH VOLUME OF BEER PACKAGED

1949

Shipments of New Containers
(in thousands of gross)

PERIOD	TIN CANS		NON-RETURN. BOTTLES		RETURNABLE BOTTLES	
	New Shipment	\$Pkgd. Volume	New Shipment	\$ Pkgd. Volume	Rev. Shipment	\$Pkgd. Volume New and Used
Year 1955	49,622.8	32.2	8,011.0	5.2	2,444.0	62.6
Year 1956	52,579.7	33.6	8,232.0	5.3	2,478.0	61.1
\$ Change	+5.9		+2.8		+1.3	
1956						
January	3,012.7	29.6	501.0	4.9	84.0	65.5
February	3,042.9	29.1	511.0	4.9	149.0	66.0
March	4,138.6	33.1	667.0	5.3	273.0	61.6
1st Quarter	10,194.2	30.8	1,679.0	5.1	506.0	64.2
April	4,651.6	37.6	644.0	5.2	340.0	57.2
May	4,855.9	32.0	816.0	5.4	367.0	62.6
June	6,306.6	38.8	921.0	5.7	358.0	55.5
2nd Quarter	15,814.1	36.1	2,381.0	5.4	1,065.0	58.5
July	6,601.5	40.0	934.0	5.7	236.0	54.3
August	5,604.9	33.5	997.0	6.0	265.0	60.5
September	4,066.9	34.9	502.0	4.3	103.0	60.8
3rd Quarter	16,293.3	36.2	2,433.0	5.4	604.0	58.4
October	4,499.6	37.5	744.0	6.2	103.0	56.3
November	2,571.4	23.1	456.0	4.1	72.6	72.8
December	3,207.1	28.6	539.0	4.8	126.0	66.6
4th Quarter	10,278.1	29.9	1,739.0	5.1	303.0	65.0
Year 1956	52,579.7	33.6	8,232.0	5.3	2,478.0	61.1
1957						
January	3,346.7	32.2	487.0	4.7	90.0	63.1
February	2,974.1	29.5	438.0	4.3	70.0	66.2
March	4,234.6	35.5	674.0	5.7	215.0	58.8
1st Quarter	10,555.4	32.6	1,599.0	4.9	375.0	62.5
April	5,309.4	40.9	681.0	5.2	230.0	53.9
May	5,648.8	36.9	893.0	5.3	407.0	57.3
June	5,323.1	34.3	926.0	5.9	417.0	59.8
2nd Quarter	16,281.3	37.2	2,490.0	5.7	1,054.0	57.1
July	6,554.0	37.8	998.0	5.6	359.0	56.6
August	5,710.9	36.1	1,118.0	7.1	225.0	56.8
September	4,339.4	34.3	460.0	3.5	35.0	62.1
3rd Quarter	16,604.3	36.3	2,576.0	5.6	659.0	58.1
October	3,785.8	32.0	689.0	5.8	84.0	62.2
November	3,131.4	30.1	675.0	6.5	90.0	63.4
December	3,872.6	32.0	465.0	3.9	81.0	62.9
4th Quarter	10,789.8	31.7	1,829.0	5.4	255.0	59.8
Year 1957	54,232.5	34.8	8,494.0	5.4	2,343.0	
\$ Change Year	+3.2		+3.2		-5.5	

[fol. 209]

1950 SHIPMENTS OF GLASS CONTAINERS FOR BEER COMPARED TO ALL GLASS CONTAINERS (number of short tons) c

PERIOD	ALL GLASS CONTAINERS	TOTAL BEER BOTTLES	% TOTAL	NON-RETURNABLE BOTTLES	% TOTAL	RETURNABLE BOTTLES	% TOTAL
Year 1955	5,513,059	472,657	8.6	344,703	6.3	127,954	2.3
Year 1956	5,642,822	482,592	8.6	359,334	6.4	123,258	2.2
% Change	+2.4	+2.1		+4.2		-3.7	
1956							
January	381,203	26,132	6.9	21,718	5.7	4,414	1.2
February	399,859	29,679	7.4	22,408	5.6	7,271	1.8
March	499,616	42,687	8.5	28,614	5.7	14,071	2.8
1st Quarter	1,280,678	98,498	7.7	72,740	5.7	25,758	2.0
April	438,450	46,750	10.7	30,107	6.9	16,643	3.8
May	493,432	57,026	11.5	38,107	7.7	18,919	3.8
June	501,698	57,803	11.5	40,386	8.0	17,417	3.5
2nd Quarter	1,433,580	161,579	11.3	108,600	7.6	52,979	3.7
July	467,266	51,604	11.2	39,695	8.5	11,909	2.5
August	638,325	53,170	9.3	41,126	6.4	12,044	1.9
September	418,591	26,404	6.3	21,686	5.2	4,718	1.1
3rd Quarter	1,524,182	131,178	8.6	102,507	6.7	28,671	1.9
October	602,208	37,610	6.2	32,290	5.4	5,320	0.9
November	410,052	23,090	5.6	19,562	4.8	3,528	0.9
December	392,122	30,637	7.8	23,635	6.0	7,002	1.8
4th Quarter	1,404,382	91,337	6.5	75,487	5.4	15,850	1.7
Year	5,642,822	482,592	8.6	359,334	6.4	123,258	2.2
1957							
January	402,884	25,216	6.2	20,698	5.1	4,518	1.1
February	381,603	22,755	6.0	19,097	5.0	3,658	1.0
March	438,250	41,087	9.4	29,757	6.8	11,330	2.6
1st Quarter	1,222,737	89,058	7.3	69,552	5.7	19,506	1.6
April	464,047	40,940	8.8	29,624	6.4	11,316	2.4
May	537,167	58,843	10.9	38,310	7.1	20,533	3.8
June	516,973	60,118	11.6	39,205	7.6	20,913	4.0
2nd Quarter	1,518,192	159,901	10.5	107,139	7.0	52,762	3.5
July	506,051	60,859	12.0	41,966	8.3	18,893	3.7
August	743,267	57,734	7.8	46,844	6.3	10,890	1.5
September	367,589	38,788	10.6	20,010	5.1	18,778	5.1
3rd Quarter	1,616,907	157,381	9.7	108,820	6.7	48,561	3.0
October	505,537	34,438	6.8	29,868	5.9	4,570	0.9
November	481,499	34,144	7.1	29,194	6.1	4,950	1.0
December	352,222	24,353	6.7	19,321	5.3	5,042	1.4
4th Quarter	1,349,258	92,945	6.9	78,383	5.8	14,562	1.1
Year	5,707,094	499,285	8.7	353,894	6.4	135,391	2.4
% Change							
Year	+1.1	+3.5		+1.3		+9.8	

[fol. 300]

**SHIPMENTS OF BEER CANS COMPARED
TO TOTAL TIN MILL PRODUCTS FOR ALL CANS
(number of short tons)**

1951

<u>PERIOD</u>	<u>ALL TYPES OF CANS</u>	<u>BEER CANS</u>	<u>% BEER CANS TO TOTAL</u>
Year 1955	4,483,999	724,166	16.2
Year 1956	4,785,671	767,319	16.0
% Change	+6.7	+6.0	
<u>1956</u>			
January	293,131	43,965	15.0
February	299,670	44,406	14.8
March	341,237	50,397	17.7
1st Quarter	934,038	144,768	15.9
April	483,628	67,883	14.0
May	338,367	70,864	20.9
June	405,083	92,055	22.7
2nd Quarter	1,227,078	230,762	18.8
July	448,529	96,339	21.5
August	593,912	81,795	13.8
September	533,261	59,642	11.2
3rd Quarter	1,575,702	237,776	15.1
October	516,540	65,665	12.7
November	265,169	37,526	14.2
December	267,144	46,802	17.5
4th Quarter	1,048,853	149,993	14.3
Year	4,785,671	767,319	16.0
<u>1957</u>			
January	314,488	48,840	15.5
February	280,395	43,402	15.5
March	323,791	61,978	19.1
1st Quarter	918,674	154,220	16.8
April	506,425	77,482	15.3
May	338,575	82,439	24.3
June	360,561	77,632	21.5
2nd Quarter	1,205,561	237,599	19.7
July	452,994	95,646	21.1
August	546,223	83,342	15.3
September	495,905	63,327	12.8
3rd Quarter	1,495,120	242,315	16.2
October	405,874	55,248	13.6
November	290,880	45,696	15.7
December	292,210	56,515	19.3
4th Quarter	988,964	157,461	15.9
Year	4,608,319	791,595	17.2
% Change Year	-3.7	+3.2	

CONTAINER MANUFACTURERS INSTITUTE, INC.

59 PARK AVENUE • NEW YORK 16, N. Y.

MURRAY HILL 2-8999

6-183

August 25, 1958

TO: The Industry

FROM: John B. Carroll

SUBJECT: Beer Container Trends--First Half of 1958

The total volume of beer sold during the first half of 1958 amounts to 40,714,900 barrels, which is a decrease of 1.0% from the same period last year. Both packaged volume and draft for this period showed slight decreases from the same period last year.

Returnable bottle shipments in the first half of 1958 amounted to 4,914,000 gross, 33.9% more than shipments in the first half of 1957. It accounted for 58.5% of total packaged volume.

Non-returnable bottle shipments amounted to 4,126,000 gross, a slight increase over the 4,089,000 gross for the same period last year. Its share of the market was 5.5% of total packaged beer volume.

Beer can shipments reached 27,169,900 gross, an increase of 1.2% over the same period last year. It accounted for 36.0% of total packaged beer volume as compared with 35.2% last year.

jbc;eb

[fol. 302]

**COMPARISON OF PACKAGED AND DRAFT
BEER SALES IN THE U.S.A.**
(in thousands of barrels of 31 gallons each)

1953

<u>PERIOD</u>	<u>PACKAGED</u>	<u>DRAFT</u>	<u>TOTAL</u>	<u>% PACKAGED</u>	<u>% DRAFT</u>
Year 1956	67,086.9	17,921.2	85,008.1	78.9	21.1
Year 1957	66,972.4	17,381.4	84,353.8	79.4	20.6
% Change	- 0.2	- 3.0	- 0.8		
<u>1957</u>					
January	4,464.3	1,224.6	5,688.9	78.5	21.5
February	4,329.6	1,240.5	5,570.1	77.7	22.3
March	5,118.7	1,319.9	6,438.6	79.5	20.5
1st Quarter	13,912.6	3,785.0	17,697.6	78.6	21.4
April	5,570.0	1,422.2	6,992.2	79.7	20.3
May	6,569.5	1,631.1	8,200.6	80.1	19.9
June	6,655.0	1,592.0	8,247.0	80.7	19.3
2nd Quarter	18,794.5	4,645.3	23,439.8	80.2	19.8
Six Months	32,707.1	8,430.3	41,137.4	79.5	20.5
<u>1958</u>					
January	4,693.7	1,244.2	5,937.9	79.0	21.0
February	4,093.5	1,141.2	5,234.7	78.2	21.8
March	4,949.6	1,303.3	6,252.9	79.2	20.8
1st Quarter	13,736.8	3,688.7	17,425.5	78.8	21.2
April	5,319.6	1,426.8	6,746.4	78.9	21.1
May	6,359.8	1,603.6	7,963.4	80.0	20.0
June	7,008.4	1,571.2	8,579.6	81.7	18.3
2nd Quarter	18,687.8	4,601.6	23,289.4	80.2	19.8
Six Months	32,424.6	8,290.3	40,714.9	79.6	20.4
% Change					
Six Months	- 0.9	- 1.7	- 1.0		

[col. 303]

1954

COMPARISON OF SHIPMENTS OF
SINGLE SERVICE & RETURNABLE CONTAINERS
WITH VOLUME OF BEER PACKAGEDShipments of New Containers
(in thousands of gross)

PERIOD	TIN CANS		NON-RETURNABLE BOTTLES		RETURNABLE BOTTLES	
	New Shipment	% Pkgd. Volume	New Shipment	% Pkgd. Volume	New Shipment	% Pkgd. Volume New and Used
Year 1956	52,579.7	33.6	8,232.0	5.3	2,476.0	61.1
Year 1957	54,238.5	34.8	8,494.0	5.4	2,343.0	59.8
% Change	+ 3.2		+ 3.2		- 5.5	
1957						
January	3,354.4	32.2	407.0	4.7	90.0	63.1
February	2,974.1	29.5	438.0	4.3	70.0	66.2
March	4,234.6	35.5	674.0	5.7	215.0	58.8
1st Quarter	10,563.1	32.6	1,599.0	4.9	375.0	62.5
April	5,309.4	40.9	681.0	5.2	230.0	53.9
May	5,648.8	36.9	893.0	5.8	407.0	57.3
June	5,323.1	34.3	916.0	5.9	417.0	59.8
2nd Quarter	16,281.3	37.2	2,490.0	5.7	1,054.0	57.1
Six Months	26,844.4	35.2	4,089.0	5.4	1,429.0	59.4
1958						
January	3,718.1	34.0	520.0	4.8	62.0	61.2
February	3,360.6	35.2	464.0	4.9	95.0	59.9
March	4,075.3	35.3	626.0	5.4	229.0	59.1
1st Quarter	11,154.0	34.8	1,610.0	5.0	386.0	60.2
April	4,194.6	33.8	672.0	5.4	407.0	60.8
May	5,338.4	36.0	831.0	5.6	667.0	58.4
June	6,482.9	39.7	1,013.0	6.4	454.0	54.1
2nd Quarter	16,015.9	36.8	2,516.0	5.8	1,528.0	57.4
Six Months	27,169.9	36.0	4,126.0	5.5	1,914.0	58.5
% Change						
Six Months	+ 1.2		+ 0.9		+33.9	

[col. 304]

SHIPMENTS OF GLASS CONTAINERS FOR BEER
COMPARED TO ALL GLASS CONTAINERS

(number of short tons)

PERIOD	ALL GLASS CONTAINERS	TOTAL BEER BOTTLES	% TOTAL	NON-RETURNABLE BOTTLES	% TOTAL	RETURNABLE BOTTLES	% TOTAL
Year 1956	5,642,822	482,592	8.6	359,334	6.4	123,258	2.2
Year 1957	5,707,094	499,285	8.7	363,894	6.4	135,391	2.4
% Change	+1.1	+3.5		+1.3		+9.8	
Year 1957							
January	405,578	25,240	6.2	20,600	5.1	4,640	1.1
February	383,843	22,682	5.9	19,031	5.0	3,651	1.0
March	436,916	41,079	9.4	29,555	6.7	11,524	2.6
1st Quarter	1,228,337	89,001	7.2	69,186	5.6	19,815	1.6
April	458,453	40,827	8.9	29,522	6.4	11,305	2.5
May	529,773	58,734	11.1	38,221	7.2	20,513	3.9
June	507,276	59,960	11.8	39,068	7.7	20,892	4.1
2nd Quarter	1,495,502	159,521	10.7	106,811	7.1	52,710	3.5
Six Months	2,723,839	248,522	9.1	175,997	6.5	72,525	2.7
Year 1958							
January	422,035	26,345	6.2	23,062	5.5	3,283	0.8
February	426,059	24,159	5.7	19,233	4.5	4,926	1.2
March	442,250	38,869	8.8	27,419	6.2	11,450	2.6
1st Quarter	1,290,344	89,373	6.9	69,714	5.4	19,659	1.5
April	446,928	49,571	11.1	29,669	6.6	19,902	4.5
May	520,460	67,782	13.0	35,733	6.9	32,049	6.2
June	515,045	65,307		43,356	8.4	21,951	4.3
2nd Quarter	1,482,433	182,660		108,758	7.3	73,902	5.0
Six Months	2,772,777	272,033		178,472	6.4	93,561	3.4
% Change							
Six Months	+1.8	+9.5		+1.4		+29.0	

1956

[fol. 305]

**SHIPMENTS OF BEER CANS COMPARED
TO TOTAL TIN MILL PRODUCTS FOR ALL CANS
(number of short tons)**

<u>PERIOD</u>	<u>ALL TYPES OF CANS</u>	<u>BEER CANS</u>	<u>% BEER CANS TO TOTAL</u>
Year 1956	4,785,671	767,319	16.0
Year 1957	4,608,319	791,595	17.2
% Change	-3.7	+3.2	
<u>1957</u>			
January	314,689	48,952	15.6
February	280,447	43,402	15.5
March	<u>323,986</u>	<u>61,798</u>	<u>19.1</u>
1st Quarter	919,122	154,152	16.8
April	506,985	77,482	15.3
May	339,323	82,435	24.3
June	<u>361,774</u>	<u>77,682</u>	<u>21.5</u>
2nd Quarter	1,208,082	237,599	19.7
Six Months	2,127,204	391,751	18.4
<u>1958</u>			
January	323,643	54,260	16.8
February	305,458	49,042	16.1
March	<u>352,212</u>	<u>59,473</u>	<u>16.9</u>
1st Quarter	981,318	162,775	16.6
April	319,748	61,213	19.1
May	365,343	77,906	21.3
June	<u>407,669</u>	<u>94,608</u>	<u>23.2</u>
2nd Quarter	1,092,760	233,727	21.4
Six Months	2,074,078	396,502	19.1
% Change Six Months	- 2.5	+ 1.2	